

**SOCIAL WELFARE IN SOUTH AFRICA: A LEGAL-PHILOSOPHICAL
ANALYSIS**

by

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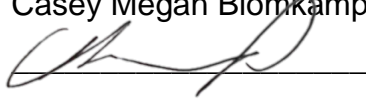
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ABSTRACT

A large portion of the population of South Africa is made up of people who, due to poverty, disability, old age and/or lack of education, rely solely on social assistance provided by the government for their survival. The issue of the welfare state in terms of responding to these issues has been subject to increasingly heated debates especially with regard to long-term socio-economic improvements, moral obligations and economic sustainability.

This dissertation generally explores the status of social welfare in South Africa, and more specifically, South Africa's socio-economic status as a welfare state against the backdrop of selected philosophical arguments used to justify and criticize existing social welfare laws in South Africa, whilst keeping South Africa's unique history in mind.

Although South Africa already has a detailed set of social welfare laws and policies, the social and economic needs of the country are ever evolving and therefore it is important that these laws and policies be constantly re-evaluated in order to ensure that they are effective in addressing and meeting the changing socio-economic and other demands.

KEYWORDS: Social welfare, social welfare law, welfare state, social assistance, affirmative action, development, poverty, utilitarianism, liberalism, egalitarianism, ubuntu, philosophy, globalisation, South Africa

TABLE OF CONTENTS

i.	TITLE PAGE	1
ii.	DECLARATION	2
iii.	ABSTRACT AND KEYWORDS	3
iv.	TABLE OF CONTENTS	4-7
1	CHAPTER 1 : INTRODUCTION	8-18
1.1	CONTEXT AND BACKGROUND	8-12
1.2	PURPOSE AND PROBLEM STATEMENT	12-14
1.3	RESEARCH, METHODOLOGY, MOTIVATION AND LIMITATIONS	14-15
1.3.1	<i>LIMITATIONS OF THE STUDY</i>	15
1.4	STRUCTURE AND OVERVIEW OF CHAPTERS	16-17
1.5	CONCLUDING REMARKS	17-18
2	CHAPTER 2 : THE CREATION OF THE WELFARE STATE: A BRIEF HISTORY	19-27
2.1	IS SOUTH AFRICA A WELFARE STATE?	19-20
2.2	EARLY LAWS AND POLICIES	20-23
2.3	APARTHEID ERA	24-26
2.4	BIRTH OF THE WELFARE STATE	26-27
3	CHAPTER 3 : THE LEGAL FRAMEWORK RELATING TO SOCIAL WELFARE IN SOUTH AFRICA	28-54
3.1	THE RULE OF LAW	28-31
3.2	CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996	31-33
3.3	INTERNATIONAL LAW	33-40
3.3.1	<i>UNITED NATIONS</i>	34-37
3.3.1.1	<i>Universal Declaration of Human Rights</i>	34-35
3.3.1.2	<i>The International Covenant on Economic, Social and Cultural Rights</i>	35-36
3.3.1.3	<i>The Convention on the Rights of the Child</i>	36-37

3.3.1.4	<i>The Convention on the Elimination of all Forms of Discrimination against Women</i>	37
3.3.2	<i>INTERNATIONAL LABOUR ORGANIZATION (ILO)</i>	37-38
3.3.2.1	<i>The Social Security (Minimum Standards) Convention</i>	37-38
3.3.3	<i>SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC)</i>	39-40
3.3.3.1	<i>SADC Treaty</i>	39-40
3.4	NATIONAL LEGAL FRAMEWORK RELATING TO SOCIAL ASSISTANCE	40-49
3.4.1	<i>THE WHITE PAPER ON SOCIAL WELFARE SERVICES</i>	40-41
3.4.2	<i>THE SOCIAL ASSISTANCE ACT</i>	41-42
3.4.3	<i>THE RECONSTRUCTION AND DEVELOPMENT PROGRAMME</i>	42-43
3.4.4	<i>GROWTH, EMPLOYMENT AND REDISTRIBUTION REPORT</i>	43-44
3.4.5	<i>ACCELERATED AND SHARED GROWTH INITIATIVE FOR SOUTH AFRICA</i>	45
3.4.6	<i>NATIONAL DEVELOPMENT PLAN</i>	46
3.4.7	<i>THE CHILDRENS ACT</i>	47
3.4.8	<i>EMPLOYMENT EQUITY ACT</i>	48
3.4.9	<i>THE BROAD BASED BLACK ECONOMIC EMPOWERMENT ACT</i>	48-49
3.5	CASE LAW	49-54
3.5.1	<i>RIGHT TO ADEQUATE HOUSING</i>	49-51
3.5.1.1	<i>Government of The Republic of South Africa & Others v Grootboom & Others</i>	49-50
3.5.1.2	<i>Minister of Public Works v Kyalami Ridge</i>	51
3.5.2	<i>RIGHT TO ACCESS HEALTH CARE SERVICES</i>	52-54
3.5.2.1	<i>Minister of Health v Treatment Action Campaign</i>	53
3.5.2.2	<i>Soobramoney v Minister of Health</i>	53-54
3.6	CONCLUDING REMARKS	54

4	CHAPTER 4 : AFFIRMATIVE ACTION IN THE CONTEXT OF SOCIAL WELFARE IN SOUTH AFRICA	55-63
4.1	DEFINITION AND PURPOSE OF AFFIRMATIVE ACTION	55-56
4.2	CRITICISM OF AFFIRMATIVE ACTION	56-59
4.3	JUSTIFICATION OF AFFIRMATIVE ACTION	59-62
4.4	CONCLUDING REMARKS	62-63
5	CHAPTER 5 : CRITICISM AND JUSTIFICATION OF A WELFARE STATE	64-83
5.1	JUSTIFICATION OF WELFARE STATES	64-72
5.1.1	<i>GENERAL PHILOSOPHY</i>	64-67
5.1.2	<i>CHILDREN</i>	67-68
5.1.3	<i>WOMEN EMPOWERMENT</i>	69-70
5.1.4	<i>DUTY OF THE STATE</i>	70-72
5.2	CRITICISM OF WELFARE STATES	72-79
5.2.1	<i>GENERAL PHILOSOPHY</i>	72
5.2.2	<i>ECONOMIC SUSTAINABILITY</i>	73-74
5.2.3	<i>ETHICALLY QUESTIONABLE</i>	74-75
5.2.4	<i>MISAPPROPRIATION OF GRANTS</i>	76
5.2.5	<i>MINIMUM WAGE</i>	76-77
5.2.6	<i>MORAL ATROPHY</i>	77-79
5.3	GLOBALISATION	79-82
5.3.1	<i>POSSIBLE EFFECTS OF GLOBALISATION ON WELFARE STATES</i>	79-81
5.3.2	<i>CAN THE WELFARE STATE BE JUSTIFIED IN AN AGE OF GLOBALISATION?</i>	81-82
5.4	CONCLUDING REMARKS	82-83
6	CHAPTER 6 : POSSIBLE ALTERNATIVES TO A WELFARE STATE	84-91
6.1	THE EXAMPLE OF RWANDA	84-85

6.2	THE EXAMPLE OF SINGAPORE	85-87
6.3	UBUNTU	87-89
6.4	INCREASING EMPLOYMENT	89-90
6.5	CONCLUDING REMARKS	90-91
7	CHAPTER 7 : CONCLUSION	92-95
7.1	THE WAY FORWARD	94-95
	ABBREVIATIONS	96
	DEFINITIONS	97-99
	BIBLIOGRAPHY	100-116

CHAPTER 1: INTRODUCTION

1.1 CONTEXT AND BACKGROUND

South Africa is the epitome of social and economic contrast. It is a prime example of diversity as well as disparity. Within its borders, there are people in dire poverty existing alongside people living in extreme wealth.¹ Socio-economic issues in South Africa have been precipitated by social unrests that have plagued the country since its independence.² Contributing factors include unemployment, poverty, HIV and AIDS, high levels of illiteracy as well as a large portion of previously disadvantaged people within the populace. These social ills have contributed to issues such as child poverty and an excessive amount of people dependant on social grants by the government.³

Inequality in the distribution of wealth fuelled the enthusiasm in the early 1900's for the concept of a "developmental state".⁴ This idea became a recurring theme among the African National Congress (ANC) leaders. It gained swift popularity because of the deep necessity to alter the economic growth path that South Africa was previously on whilst simultaneously balancing this with social development.

The argument has been that the South African government has failed or is struggling to instil an economic growth path that ensures a balance between social assistance and social development.⁵

Post-apartheid, South Africa can be divided into three broad classes:

1. an increasingly multiracial upper class which forms a small part of the population;

¹ World Bank <https://openknowledge.worldbank.org/handle/10986/26447> (Date of use 1 January 2019) 24.

² United Nations <http://hdr.undp.org/en/data> (Date of use 1 January 2019).

³ Dinbabo FM *Social Welfare Policies and Child Poverty in South Africa: A Microsimulation Model on the Child Support Grant* (PhD Thesis UWC 2011) 88-93.

⁴ African National Congress "The Reconstruction and Development Programme" 1994

⁵ Seekings J "The 'Developmental' and 'Welfare' State in South Africa: Lessons for the Southern African Region" 2015 CSSR General Working paper 1-5.

2. a "middle" class of mostly urban, employed workers; and
3. a marginalized class of previously disadvantaged people as well as other people living in poverty, comprising of the unemployed as well as domestic and agricultural workers. This group forms a large portion of the population.⁶

Due to political, economic and social pressure, the government developed strategies and bills that encourage the private sector to take an active role in social development, which resulted in a rise in soft policies on Corporate Social Responsibility (CSR) and wealth disparity.⁷ Not all CSR efforts result from voluntary decisions however, as is evident from affirmative action legislation.⁸ Such affirmative action, as well as a philosophical exploration thereof is discussed in more detail in Chapter four.

Despite its efforts, South Africa has increasingly veered towards becoming a welfare state,⁹ whilst there has been little progress towards the development as envisaged by the government.¹⁰ In 2010, highly esteemed economist, Mike Schussler, was quoted at a post-budget speech as saying, "South Africa is the biggest welfare state in the world".¹¹ Schussler used the fact that, at the time, for every taxpayer there were three welfare dependants. He further submitted that such a ratio is not sustainable in the long term. The South African Institute of Race Relations (IRR) submitted a press release in 2015, which also questioned the sustainability of South Africa's social services.¹² Former Head of Research at IRR, Lerato Moloi, was quoted saying that, "...a paradigm shift in Government's developmental policy

⁶ Nattrass N and Seekings J "Two Nations? Race and Economic Inequality in South Africa Today" 2001 *Daedalus* 45-70.

⁷ Mukwarami S, Nyirenda G and Fakoya MB "Governance of corporate social responsibility and return on assets in the South African mining firms" 2017 *AJPA* 1-18; Soft policies on CSR are included in the King II and King III reports that can be found at <http://www.sustainabilitysa.org>.

⁸ Broad Based Black Empowerment Act 53 of 2003 and Economic Equity Act 55 of 1988.

⁹ The definition of a welfare state for the purpose of this thesis is described on page 99.

¹⁰ Southhall R "Introduction: Can South Africa be a developmental state?" in Buhlungu S, Daniel J, Southall R & Lutchman J (eds) *State of the Nation: South Africa* (HSRC Press Cape Town 2006) 17-41.

¹¹ Mail & Guardian <https://mg.co.za/article/2010-02-18-sa-the-biggest-welfare-state-in-world-says-economist> (Date of use: 18 September 2017).

¹² IRR <https://irr.org.za/media/media-releases/sustainability-of-south-africas-social-services-net-in-doubt/@@download/file/IRR%20Press%20Release%20%E2%80%93%20Sustainability%20of%20South%20Africa%E2%80%99s%20social%20services%20net%20in%20doubt.pdf> (Date of use 13 November 2018).

model is necessary, so that employment and higher economic growth are prioritised”.¹³ Despite the questionable sustainability of the welfare state, South Africa continues to focus on providing social grants to the disadvantaged at an ever-increasing rate.¹⁴ During the 2017-2018 budget speech, it was indicated that three new conditional grants had been created and that the budget for social grants had been raised to 490.4 billion rand.¹⁵ At the same time, little progress has been made with regard to job creation and economic growth.¹⁶ This is evident by the fact that the employment rate in South Africa is steadily dropping. Over the last ten years (2008 – 2018), the unemployment rate increased from 21.5 per cent to 28 per cent.¹⁷

The concept of a welfare state is underpinned mainly by the philosophical concept of social liberalism.¹⁸ This philosophy argues that governments must take a dynamic role in upholding the freedom of citizens. John Rawls states that, “Whether men are free is determined by the rights and duties established by the major institutions of society”.¹⁹ At the time, Rawls’ *A Theory of Justice* was disputably the most inclusive clarification of the “social contract” and has been regularly held as a legitimisation of the welfare state.²⁰ Social liberalism incorporates the belief that genuine freedom can only occur when citizens are healthy, educated and free from dire poverty.²¹ This can only be assured when a government can guarantee the right to education, adequate health care and an adequate living wage, in addition to laws that protect against unfair discrimination and the provision of social assistance to those in need, all of which would have to be supported by a progressive taxation system.

¹³ IRR <https://irr.org.za/media/media-releases/sustainability-of-south-africas-social-services-net-in-doubt> (Date of use: 26 April 2019).

¹⁴ Gordhan P <http://www.treasury.gov.za/documents/national%20budget/2017/speech/speech.pdf> (Date of use: 18 September 2017).

¹⁵ Gordhan P <http://www.treasury.gov.za/documents/national%20budget/2017/speech/speech.pdf> (Date of use: 18 September 2017).

¹⁶ Statistics SA https://www.statssa.gov.za/presentation/Stats%20SA%20presentation%20on%20skills%20and%20unemployment_16%20September.pdf (Date of use: 1 January 2019) 29.

¹⁷ Statistics SA <http://www.statssa.gov.za/?p=11688> (Date of use 13 November 2018).

¹⁸ Social liberalism is defined on page 98.

¹⁹ Rawls J *A Theory of Justice* (HUP Cambridge 1971) 55; John Rawls was a moral and political philosopher of the 20th century who promoted mostly social liberal beliefs and will be discussed in more detail in Chapter 5.

²⁰ Birnbaum S “Radical liberalism, Rawls and the welfare state: justifying the politics of basic income” 2010 *CRISP* 495 - 516.

²¹ Kukoc M “Liberal Philosophy and Globalisation” 2009 *Synth Philos* 71.

In a similar way, utilitarianism supports the idea of taxation and redistribution of wealth, however its goal is to aim for the greatest total happiness across the population.²² The most important economic objectives thereof are to ensure that basic needs (such as food, water and shelter) and services (such as health care) are widely available in order to allow the greatest number of people to have the greatest possible quality of life. Taxation does indeed help to achieve wide resource distribution, however realistically, excessively high rates of tax often reduce the rates of investment and incentives, which in turn negatively affect the economy.²³ This would then make it difficult to produce the adequate resources required. Too much redistribution may thus mean not enough resources to share out. Utilitarians must therefore attempt to strike a balance. Economists, rather than philosophers, are the ones to advise on how to do this balancing of interest to get the most productive result. How this should be done is a different question altogether and falls outside the scope of this dissertation.

Another social philosophy that supports a welfare state is that of egalitarianism, which actively advocates the removal of economic inequalities among people.²⁴ Alexander Berkman supported the principles of modern egalitarianism whilst defining equality further by stating, "equality does not mean an equal amount but equal opportunity".²⁵ The ruling party in South Africa, the African National Congress (ANC), has often been described as having strong egalitarian views.²⁶

South Africa's current welfare system shows evidence of influence from all of the above philosophical schools of thought. Although it has been claimed that, in a very unequal society such as South Africa, the development of a welfare state can play a stabilising role,²⁷ the fact remains that since 1994, unemployment has

²² Bentham J *The Principles of Morals and Legislation* (Clarendon Press Oxford 1789) 3; Jeremy Bentham was an 18th and 19th century philosopher who is often considered the founder of modern utilitarianism. Utilitarianism is defined on page 99.

²³ Calitz E, Wallace S and Burrows L "The impact of tax incentives to stimulate investment in South Africa" 2003 *Stellenbosch Economic Working Papers* 3.

²⁴ This is also known as Asset-based egalitarianism. Thomas Paine made this a central tenet of his philosophy. This can be seen in his books "Right of Man" and "Argarian Justice". Egalitarianism is defined on page 97.

²⁵ Berkman A *What is Anarchism?* 2013 AK Press 164–165.

²⁶ Darracq V "The African National Congress (ANC) Organization at the Grassroots" 2008 *African Affairs* 14.

²⁷ Le Roux P "Why a universal income grant for South Africa should be financed through VAT and other indirect taxes" in Standing G and Samson M (eds.) *A basic income grant for* (UCT Press Cape Town 2003) 39-55 ; OECD Library <https://www.oecd->

progressively risen whilst the number of beneficiaries on social grants have also increased steadily.²⁸

It is indeed evident that the developmental state as envisaged by the country's leaders has failed while the welfare state has steadily grown.

1.2 PURPOSE AND PROBLEM STATEMENT

As part of a closer look at social welfare in South Africa, one purpose of this dissertation is to explore South Africa's socio-economic status as a welfare state by giving an analysis of selected philosophical arguments used to justify and criticize welfare states.²⁹ The need for a balance between social welfare and developmental policies will also be alluded to.³⁰ This balance affects the most disadvantaged people, with the goal to directly improve their quality of life and independence, whilst indirectly affecting South Africa as a whole by ensuring economic sustainability and long-term social development by the eradication of poverty.

The main purpose of this dissertation is to explore a selection of universal philosophical arguments regarding welfare states in general and address the question whether a welfare state in South Africa is viable and justified, considering the above theories and taking into account the Constitution of the Republic of South Africa³¹ (hereinafter referred to as the Constitution), relevant legislation, case law, international law, as well as South Africa's unique history.

Intensified by apartheid and the various racial legislation adopted pre-1994, a large portion of the population is made up of disadvantaged people who, mainly due to poverty and/or lack of education, rely solely on social assistance provided by the

ilibrary.org/economics/oecd-annual-report-2009_annrep-2009-en (Date of use: 2 January 2018).

²⁸ Statistics SA
https://www.statssa.gov.za/presentation/Stats%20SA%20presentation%20on%20skills%20and%20unemployment_16%20September.pdf (Date of use 13 November 2018).

²⁹ Social welfare is defined on page 99.

³⁰ Jacobs P *et al* "Developmental social policies for the poor in South Africa: Exploring options to enhance impacts" conference paper 20-22 September 2010 OR Tambo Conference Centre Johannesburg 3-19.

³¹ Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution).

government.³² The assumption is that South Africa has become a welfare state in order to support these disadvantaged people. Whilst it can be argued that economists foresee that the welfare state is not sustainable/desirable in the long term, this dissertation hopes to show that it is justifiable in the short term from a philosophical (social liberalism, utilitarianism and modern egalitarianism) point of view. It cannot however be overlooked that current social welfare policies in South Africa are not providing sufficient social development in order to reach the ideal point where the welfare state will no longer be required.³³

The issue of the welfare state in terms of responding to poverty has been the subject of many debates, especially with regard to long-term social improvements and economic sustainability. Some international authors argue that welfare states do not reduce poverty and further claim that social welfare programmes undermine economic growth and thereby fail to reduce poverty in the long run.³⁴ This is often blamed on the fact that too little of the money reaches the poor or that social grant programmes encourage reliance on benefits which result in increased rate of poverty.³⁵ Despite this, there is extensive research that shows that the South African welfare state has led to an increased standard of living for many grant beneficiaries.³⁶ This, in theory, should encourage social transformation and sustainability. In particular, current research shows that Child Support Grants in South Africa greatly increases the standard of living as well as the education levels of children living in poverty.³⁷ Ensuring a better future for children is in line with utilitarianism because of the fact that improving the future of children automatically improves every citizen's future.³⁸

³² United Nations <http://hdr.undp.org/en/content/human-development-report-2000> (Date of use: 2 January 2019) and Statistics SA "Employment, unemployment, skills and economic growth" 2015 available at: <https://www.statssa.gov.za> (Date of use: 31 December 2018).

³³ United Nations <http://hdr.undp.org/en/content/human-development-report-2000> (Date of use: 2 January 2019).

³⁴ Lindbeck A *et al Turning Sweden around* (MIT Press Cambridge 1994) 48-50.

³⁵ Crook C "The future of the state" 1997 *Economist* 1-57 ; Lee D "The trade-off between equality and efficiency: Short-run politics and long-run realities" 1987 *Public Choice* 149-165.

³⁶ McKernan S and Ratcliffe C "The Effect of Specific Welfare Policies on Poverty" 2006 *The Urban Institute* 18-23 ; Coetzee M "Finding the Benefits: Estimating the Impact of The South African Child Support Grant" 2013 *S Afr J Econ* 427-450.

³⁷ Coetzee 2013 *S Afr J Econ* 427-450.

³⁸ Skelton A "Utilitarianism, Welfare, Children" in Bagattini A and Macleod C (eds) *The Nature of Children's Well-Being: Theory and Practice* (Springer Dordrecht 2014) 85-103.

As previously discussed, the government leaders have insisted that their goal is to create a functioning developmental state rather than a welfare state. However, failure of the developmental state and the simultaneous growth of the welfare state is becoming obvious. This study will argue and demonstrate that although the welfare state may be justifiable at present, the welfare state in its current form is detrimental to the country, as well as to its citizens/permanent residents in the long term. In response to this issue, the various justifications and criticisms of welfare states will be explored in a hope to provide a foundation on which further research regarding ways to mitigate the negative aspects of a welfare state and/or alternatives to the welfare state can be based.

1.3 RESEARCH METHODOLOGY, MOTIVATION AND LIMITATIONS

A qualitative and descriptive methodology will be used in the form of desktop research, including the collation and/or synthesis of existing research and literature. Well-compiled qualitative studies improve comprehensibility of social phenomena and thus are an important form of research.³⁹ Existing data and statistics already collected, using traditional quantitative data collection methods by reputable institutions such as Statistics SA, will also be referred to, where relevant.

A literature review for this research will be carried out in order to highlight existing knowledge relating to the problem statement. The sources will include legislation, legal texts, national case law and international instruments, as well as journal articles, accepted theses, textbooks and internet sources. Some relevant jurisprudential theories relating to the justification of welfare states will also be studied. The ultimate aim of the research is to provide a summation and analysis of literature that will assist in generating discussions around the restructuring of social welfare planning in South Africa.

³⁹ Webley L “Qualitative Approaches to Empirical Legal Research” in Cane P and Kritzer HM (eds) *The Oxford Handbook of Empirical Legal Research* (OUP 2010) 926 – 950.

1.3.1 LIMITATIONS OF THE STUDY

Due to the fact that this study is limited to desktop research and due to the fact that the author does not have practical experience in the field of social welfare, it may be possible that this dissertation lacks practical-orientation.

Although copious amounts of research has been done in the international field, there is a lack of previous studies with regard to practical alternatives to a welfare state which are specific to South Africa. As such, this dissertation opens new avenues of research and lays a groundwork for a more complete research in the future.

Two foreign countries' social welfare systems will be very briefly discussed in order to provide some direction on useful comparatives for future research on the topic. In fact, numerous other foreign countries' welfare systems could also offer valuable perspectives. As such, this is an area where this dissertation may be seen as lacking in scope, however, but it is submitted that this dissertation will provide a foundation for future South African legal research projects on the subject.

Another limitation to consider is that there is a lack of empirical and conclusive data relating to the possible misuse of monetary grants by the beneficiaries. This is because monetary grants are difficult to control or monitor once they reach the hands of beneficiaries. Therefore, the section on "Misappropriation of Social Grants" may be regarded as speculative and tentative at this point in time.

Finally, there are far too many varying views on welfare states for them all to be discussed in detail in this dissertation. In addition to this, many common (and widely believed by the general public) criticisms and justifications have just been derived from personal thoughts and opinions, having no scholarly value. Therefore, only the most researched points have been raised in this study. In addition, the study relies only on selected relevant philosophical theories that have a bearing on this topic. Due to the limited scope of the dissertation, it is not possible to discuss these theories extensively.

1.4 STRUCTURE AND OVERVIEW OF CHAPTERS

For the purpose of this dissertation, it is assumed that South Africa is an accurate example of a welfare state. It is therefore necessary to show how this state evolved. In Chapter two, the question of whether South Africa can be described as a welfare state is answered by studying the definition of a welfare state as well as by comparing the poverty trends, social grant statistics and relevant research describing the failure of the developmental state. A brief history of the various social welfare laws is discussed and the origin of the welfare state in South Africa is explained with an emphasis on the significant role that apartheid played in the creation thereof.

Chapter three begins by explaining the concept of the Rule of Law. This is important because the status of the Rule of Law in South Africa can be questioned at present.⁴⁰ This directly affects all facets of the country, including the country's ability to provide social assistance and security. Thereafter, the framework for social welfare in South Africa, which consists of various laws and legal documents, is analysed. This chapter concentrates on the legislation, case law and other national and international legal instruments related directly and indirectly to social welfare in the country. The relevance and significance of the Constitution with regard to the rights to social assistance is also discussed.

Incorporating affirmative action into a welfare state is an important topic in South Africa specifically. The ethical and philosophical views regarding affirmative action will be mentioned in Chapter four. As affirmative action shares common goals with a welfare state and is focused on assisting the previously disadvantaged, for the purpose of this dissertation, it will be included under the umbrella of the "welfare state". The groups of people who qualify to benefit from affirmative action measures are mostly the same people who rely on social assistance from the government. Social welfare and affirmative action are therefore inevitably intertwined.

Chapter five provides an analysis of a welfare state where both criticisms and justifications thereof are explored. The theories of selected philosophers are used in this analysis. The various philosophers were selected on the grounds of their

⁴⁰ This is explained in more detail in Chapter three, paragraph 3.1.

interest and relevance to social and political philosophy that directly relate to social welfare. The aspect of globalisation is extremely important as it effects almost every aspect of human life. Social welfare is not an exception. The way globalisation affects welfare states is an important topic as globalisation is increasing exponentially each year.

Chapter six proposes some diverse ideas from which practical alternatives to a welfare state could possibly develop. Certain successful aspects of the social system in Rwanda are explored, specifically regarding its compulsory health insurance policies. Furthermore, it is widely acknowledged that South Africa is facing many economic challenges, therefore Singapore's social system was also chosen due to its remarkable climb up the international income ladder whilst incorporating an alternative to the traditional welfare state. The concept of Ubuntu is uniquely African and the tenets thereof may be of assistance in mitigating the negative aspects of a welfare state. Certain points of view from the United States are relevant to the situation in South Africa and could provide some guidance on certain issues. A comprehensive comparison of the South African position to that of Rwanda, Singapore and the United States is not provided as such a comparison falls outside the scope of this dissertation. Similarly, other relevant foreign social welfare systems have been omitted although it is acknowledged that there are numerous others that have not been mentioned. The purpose of this chapter is to provide a preliminary base on which further research may be built and as such, it does not go into a detailed comparative discussion between foreign welfare systems and South Africa.

Chapter seven comprises of a brief summary of the findings and a conclusion on the way forward.

1.5 CONCLUDING REMARKS

This dissertation illustrates a set of specific philosophical views towards welfare states, as well as some of the benefits and shortcomings of such a system. These findings will hopefully be useful in developing more effective future social welfare policies and frameworks in South Africa, which will assist in both eradicating poverty

and addressing the challenge of inequitable distribution of income with as little negative impact to the economy as possible.

CHAPTER TWO:

THE CREATION OF THE WELFARE STATE: A BRIEF HISTORY

Since becoming a constitutional democracy,⁴¹ the South African government has been implementing and developing laws and social policies that concentrate on the mitigation of poverty, focusing on previously disadvantaged people.⁴² A social system has thus developed where the government has taken major steps towards assuming responsibility to safeguard the health and social and financial well-being of its citizens.

The question of whether South Africa can be described as a welfare state is answered in this chapter. Thereafter, a brief history of the various early social welfare laws and policies are discussed. The basis of the welfare state in South Africa is explained with an emphasis on the substantial role that apartheid played in the formation thereof.

2.1 IS SOUTH AFRICA A WELFARE STATE?

Before the above question is addressed, it is necessary to understand what is meant by a welfare state. In its most simple form, a welfare state generally encompasses two types of government spending provisions. These provisions can be described as:

- (1) Cash grants (transfers) in the form of social assistance;
- (2) Free or government subsidised public services, such as education, health care, housing and municipal services.

South Africa seems to fit perfectly into this narrow definition with its seven monetary social grants as well as the various free/subsidised public services (such as subsidised housing and public hospitals and schools). However, the ANC appears to fervently deny the formation of a welfare state and instead insists that they are in

⁴¹ Constitutional democracy is defined on page 97.

⁴² South African Government <https://www.gov.za/documents/national-development-plan-2030-our-future-make-it-work> (Date of use: 31 December 2018).

the process of creating a developmental state, explaining that “[s]ince we are building a developmental and not a welfare state, the social grants will be linked to economic activity and community development, to enable short-term beneficiaries to become self-supporting in the long run”.⁴³ According to Seekings, the vision of the ANC to create a developmental state with an active strategy that would navigate the economy down the sought after economic growth path has failed.⁴⁴ Seekings goes further to state that it was the embracing of an impractical strategy that resulted in the economy going down an economic path that resulted in stunted development.⁴⁵ The failure of the developmental state is further evident from the poverty trends in South Africa, which show that the number of households receiving at least one form of social grant is increasing from year to year. (29.9 per cent of the population in 2003 to 44.8 per cent in 2016).⁴⁶ From this information, it appears that dependency on social grants has been growing steadily. This trend clearly shows that South Africa is drifting further from its goal where grant beneficiaries become self-supporting. The developmental state has failed and a welfare state has taken its place. In order to be able to analyse social welfare in South Africa, a brief history describing the creation and rise of the welfare state will be discussed next.

2.2 EARLY LAWS AND POLICIES

The first major colonisation of the land now known as South Africa came by the hands of the Dutch in 1600’s with the formation of the Cape Colony. Initially, the Cape Colony was nothing more than a resupply depot for passing ships and the people who lived there were generally considered to have been deprived of any luxuries. In fact, life for the Dutch colonists was extremely challenging and even meeting basic needs was a struggle. “Markets were small, conditions difficult and progress slow”, as stated by Feinstein, a respected South African and British economic historian and author.⁴⁷ This mirrors other authors’ views, such as De

⁴³ The State of The Nation Address by former president of the Republic of South Africa, JG Zuma at the joint sitting of Parliament, Cape Town 10 February 2011.

⁴⁴ Seekings 2015 CSSR General Working paper 8.

⁴⁵ Seekings 2015 CSSR General Working paper 12.

⁴⁶ Statistics SA <http://www.statssa.gov.za/?p=9922> (Date of use 9 November 2018) and <http://www.statssa.gov.za/?p=7756> (Date of use 23 August 2018).

⁴⁷ Feinstein CH *An Economic History of South Africa* (Cambridge University Press 2005) 5.

Kock's previous evaluation that the early Dutch colony "advanced with almost extreme slowness".⁴⁸ Some form of rudimentary social assistance was necessary for the settlers as early as the late 1650's, where the Dutch East India Company, along with the Dutch Reformed Church started issuing relief, albeit extremely limited, to the poverty-stricken White farmers whose harvests had failed. Conversely, the Dutch were less likely to offer any relief to indigenous Africans. It is submitted that this was due to the racial outlooks of these early settlers and their adverse sentiments of traditional indigenous African customs and traditions.⁴⁹

The poverty levels were exacerbated by the discovery of diamonds and gold during 1867 to 1886, which assisted in initiating the industrial revolution.⁵⁰ This in turn led to mass urbanisation.⁵¹ It is common knowledge that during the industrial revolution, the mining industry employed Black Africans as migrant labourers in the urban areas but prevented them from bringing their families along.⁵² The families of these migrant labourers had no option other than to remain on reserves that had become increasingly impoverished. The process of industrialisation and simultaneous urbanisation directly resulted in the exponential increase of poverty.⁵³ This view is corroborated historically as a general pattern of increased poverty alongside industrial revolutions can be noted.⁵⁴

Until 1932 (when the price of gold soared), the gold mines relied heavily on keeping the Black migrant labourers' wages as low as possible in order to reduce operating costs. The migrant labourers' wages were further decreased by the creation of a monopsonistic labour recruiting agency (the WNLA).⁵⁵ This decrease led to a

⁴⁸ De Kock MH *Economic History of South Africa* (Juta Cape Town 1924).

⁴⁹ Brown M and Neku RJ "A historical review of the South African social welfare system and social work practitioners' views on its current status" 2005 *International Social Work* 312.

⁵⁰ Marks S and Rathbone R *Industrialisation and social change in South Africa: African class formation, culture, and consciousness, 1870-1930* (Longman New York 1982).

⁵¹ Stanley T and Williams G "South Africa in a comparative study of industrialization" 2008 *Historia* 10-23.

⁵² Delius P "The History of Migrant Labor in South Africa (1800–2014)" 2017 *Oxford Research Encyclopedia of African History*.

⁵³ Patel L *Restructuring Social Welfare: Options for South Africa* (Raven Press Johannesburg 1992).

⁵⁴ Fraser D *The evolution of the British welfare state: a history of social policy since the Industrial Revolution* (Macmillan International Higher Education 1992) ; De Vries J "The industrial revolution and the industrious revolution" 1994 *J Econ Hist* 249-270.

⁵⁵ The WNLA (Witwatersrand Native Labour Association) had the monopoly of the migrant labour market and all migrants who wished to gain employment in the gold mines had to go through its agency.

substantial drop in the number of available labourers and, due to this drop, new labourers were introduced from China (although this was short lived due to political pressure). This brief Chinese presence however had the effect of disabling the Black Africans' bargaining power and they soon returned to the mines to be paid even lower wages.⁵⁶ This clearly shows the pure desperation and the utterly critical situation faced by Black Africans at the time.

South Africa's social assistance system started taking legislative shape during the early 1900's. The Children's Protection Act of 1913 and the Workmen's Compensation Act of 1914 were the first formal social assistance laws. These introduced grants for injured or ill workers as well as maintenance grants for children. Although "urban Africans" technically qualified to apply for the maintenance grants, researchers, such as Borat, point out that "[v]ery few of these grants reached African parents and none were given to rural Africans".⁵⁷

The Old Age Pensions Act of 1928 authorised all Coloured and White males over 65 years and females over 60 years to claim old-age pensions. Whites' pensions were a maximum of R5.00 a month and Coloureds' R3.00.⁵⁸ Blacks and Indians were excluded entirely. Rural Blacks, the state argued, could rely on kinship and community bonds to assist them into old age, whereas urban Blacks were excluded on the basis that they were not easily discernible from their rural counterparts.⁵⁹ In the same vein, disability grants were soon introduced with the total exclusion of Blacks and Indians.

In this way, the stage was set for racial discrimination to breed uncontrollably. From the very first acts of social assistance, certain people were actively excluded due to the colour of their skin.

The expansion of racism and colonialism are usually found to be deeply entwined, and this was unfortunately also the case in South Africa.⁶⁰ These early social

⁵⁶ Stanley and Williams 2008 *Historia* 10-23.

⁵⁷ Borat H "The South African social safety net: past, present and future" 1995 *Dev South Afr* 595 – 604.

⁵⁸ Pollak H "State social pensions, grants and social welfare" in Van der Horst ST and Reid J (eds) *Race Discrimination in South Africa - A Review* (David Philip Cape Town 1981) 157.

⁵⁹ Borat 1995 *Dev South Afr* 595 – 604.

⁶⁰ Loomba A *Colonialism/postcolonialism* (Routledge 2007) 44.

policies were clearly formed upon the basis of race and class as well as internal politics.⁶¹ In addition to the Dutch who arrived in the 1652, the British arrived in 1820 and, as such, social policies were also influenced by British *laissez-faire*,⁶² as well as the “British Poor Law tradition”, which saw unemployment primarily as a moral problem and was traditionally linked to the distinction between “deserving” and “non-deserving poor”. The former were unable to work due to physical disabilities or other reasons such as old-age, while the latter were classified as “idle” and therefore sent to workhouses.

During the 1940’s an imperfect attempt was made at equality whereby old-age pensions and disability grants were extended to include both “Indians” and “Africans”. However, inequality on the basis of race remained due to the maximum amounts for these grants. For example, during 1947, the maximum pension for White people was five times that of Black people. Coloured and Indian people were paid out half as much as Whites.⁶³ In this way, discrimination was allowed to fester beneath a thin veil of “equality”.

In 1943, it was announced that all school children (regardless of race) were to be given one free meal per day under the direction of the Department of Social Welfare. *Prima facie*, this also seemed an attempt at equality, however, racial discrimination was once again implemented in 1945 when Black schools were placed under the Union Education Department. White, Coloured and Indian remained under the provincial administrations, where the school feeding scheme and government subsidisation continued, whilst Black schools did not.⁶⁴

These inadequate attempts at producing the illusion of equality were short-lived however as the worst racial discriminations were yet to come.

⁶¹ Triegaardt J “Reflections on poverty and inequality in South Africa: Policy considerations in an emerging democracy” delivered at the annual ASASWEI conference 18-20 September 2006 (SARPN 2006) 1-9.

⁶² Laissez-faire is defined on page 98.

⁶³ Bhorat 1995 *Dev South Afr* 597.

⁶⁴ Moll P “A Supplementary Children’s Feeding Program. Second Carnegie Inquiry into Poverty and Development in South Africa” 1985 *Post-Conference Paper No 5 4*.

2.3 APARTHEID ERA

Between 1948 and 1954, after The National Party came into power, laws that entrenched total racial discrimination were enacted. The first of these laws were the Prohibition of Mixed Marriages Act 55 of 1949 and the Immorality Act 23 of 1950, which prohibited interracial sexual relationships or marriages. Thereafter numerous other laws were enacted including the Population Registration Act 30 of 1950 which formally categorised all South Africans into one of four racial groups being White, Coloured, Indian or Black.⁶⁵ Using these groups, the apartheid government was able to enforce the laws that prohibited interracial relationships and marriages and numerous people were arrested and charged for breaking its provisions.

A minimum income requirement was then created for Black people in order to qualify for benefits from the Unemployment Insurance Fund. This effectively barred many of them from receiving unemployment benefits.⁶⁶ Social assistance for Black people diminished continuously and by 1954 the majority of resources in the fund were paid to White people only.⁶⁷ A similar movement took place with regard to old-age pensions. While state old-age pensions for White people constantly increased over the years, Black pensions were simultaneously reduced, thereby prompting the economic gap between the two racial groups to grow progressively.⁶⁸

It was now clear that the former government's insidious purpose was to create and secure a form of White supremacy in South Africa.⁶⁹ This shameful period became known as the apartheid era. With the passing of these appallingly racist laws and policies, the Black population was effectively excluded from White society. Every facet of social life of Black people was permeated by these laws. There were very few economic opportunities for Black people due to the lack of access to jobs, as well as the immense poverty which was growing within the Black townships and

⁶⁵ SA History <http://www.sahistory.org.za/article/apartheid-legislation-1850s-1970s> (Date of use: 18 September 2017).

⁶⁶ Harmaann C "Social assistance in South Africa: Its potential impact on poverty" 2000 *UWC* 12 – 13.

⁶⁷ Terreblanche SJ "A History of Inequality in South Africa" 2002 *University of Natal Press* 23 – 51.

⁶⁸ Borat 1995 *Dev South Afr* 598 – 599.

⁶⁹ Walton F C *et al The Routledge Companion to Race and Ethnicity* (Routledge Books New York 2011) 6.

independent-states.⁷⁰ Segregation also infiltrated education and the result was unequal educational standards and opportunities. The Black schooling system was of poor quality and grossly underfunded while White children received superior schooling with access to world-class tertiary education.⁷¹ The separation of services according to race propagated the discrimination, in that Blacks, who arguably had the greatest need, received the smallest percentage of the welfare budget and were the least likely to have access to basic infrastructure such as housing, running water, and electricity.⁷²

The devolution of welfare services also gave rise to duplications, inefficiencies and conflicting standards within the various welfare departments. These can be summarised as follows:

1. Coloureds, Indians and Whites received payments monthly while Blacks were only given their allowance every second month;
2. Coloureds, Indians and Whites were paid by cheque through the post office while Blacks were paid in cash at various mobile sites, such as schools, under trees or in stores;
3. Pensions for the minority were payable from the date of application, while those of the Black majority were payable from the date of approval.⁷³

The exceedingly racist policies that were implemented during the apartheid era did not go unnoticed, and as such, national and international resistance against apartheid grew, especially during the mid-1970's and throughout the 1980's.⁷⁴ Numerous economic, political and sporting sanctions placed against South Africa at the time began to weaken the economy and place political strain upon the apartheid government. In addition to this, there was increasingly violent civil unrest that

⁷⁰ Louw EP *The Rise, Fall, and Legacy of Apartheid* (Greenwood Publishing Group Westport 2004) 55 – 85.

⁷¹ Louw *The Rise, Fall, and Legacy of Apartheid* 59.

⁷² Mamphiswana D and Noyoo N "Social Work Education in a Changing Socio-political and Economic Dispensation" 2000 *ISW* 21–32.

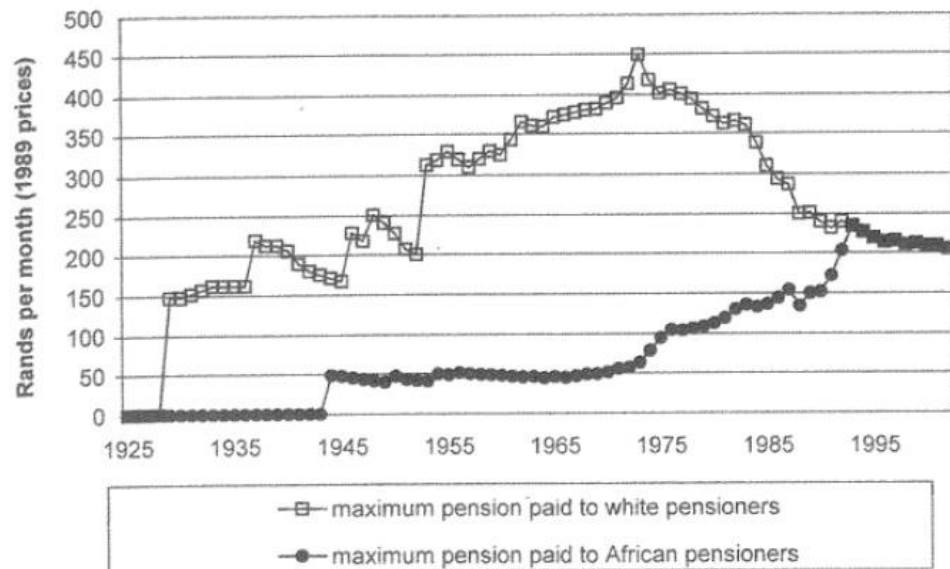
⁷³ Lund F "The Way Welfare Works: Structures, Spending, Staffing and Social Work in the South African Welfare Bureaucracies" in Snyman I (ed) *Co-operative HSRC Programme: Affordable Material Provision* (Human Sciences Research Council Pretoria 1992) 39–40.

⁷⁴ Louw *The Rise, Fall, and Legacy of Apartheid* 131 – 160.

culminated in thousands of people being pitilessly tortured and/or imprisoned and even murdered.⁷⁵

This precipitated the relaxation of certain social policies, most notably with the rising of the maximum amounts for the “non-contributory old-age grant for Africans” compared to their White counterparts.⁷⁶

Graph 1: Maximum pensions paid to Africans and 'whites', 1925-2000



Source: Seekings & Nattrass⁷⁷

In 1977, racial differentiation of payments in terms of the Unemployment Insurance Act was also abandoned.⁷⁸ Minimum income restrictions, however, remained.

2.4 BIRTH OF THE WELFARE STATE

Despite the various amendments of racist policies and apartheid laws, it was not until the creation of a constitutional democratic government in 1994, led by the ANC,

⁷⁵ Brown and Neku 2005 *ISW* 303.

⁷⁶ Seekings J and Nattrass N *Class, Race, and Inequality in South Africa* (Yale University Press London 2005) 131.

⁷⁷ Seekings and Nattrass *Class, Race, and Inequality in South Africa* 131.

⁷⁸ Meth C and Piper S “Social Security in Historical Perspective. Second Carnegie Inquiry into Poverty and Development in South Africa” 1984 *SALDRU UCT* 22.

along with the abolition of apartheid, that social assistance laws were completely de-racialised.⁷⁹

However, although the apartheid era was officially over, it left a tainted legacy that lingers to this day. The South African government was now faced with the mammoth task of not only assimilating the formerly oppressed Black population into the economy, but also of mending the painful wounds the injustices of the past had created.⁸⁰ This need eventually resulted in one of the largest social welfare systems in the world.

⁷⁹ SA History <http://www.sahistory.org.za/article/apartheid-legislation-1850s-1970s> (Date of use: 18 September 2017).

⁸⁰ Madlingozi T "Post-Apartheid Social Movements and the Quest for the Elusive 'New' South Africa" 2007 *J Law & Soc* 1-22.

CHAPTER 3:

THE LEGAL FRAMEWORK RELATING TO SOCIAL WELFARE IN SOUTH AFRICA

Social welfare laws are effective and necessary structures that are pivotal in the introduction and facilitation of social change in any country. This chapter sets out and describes the various laws and legal policies that form the legal framework regulating social welfare in South Africa. This includes an analysis of the Constitution, in so far as it relates to social welfare as well as an overview of the various original (Acts of parliament) and subordinate (Regulations and Proclamations) social welfare legislation and policies (both national and international). Finally, relevant case law is discussed. However, before commencing with the analysis of the legal framework, it is necessary to discuss the concept of the “Rule of Law” due to the importance of having a standardised set of social laws to secure a unified foundation for social rights where legal certainty is guaranteed, and the administrative and judicial application of laws are facilitated fairly and without corruption.

3.1 THE RULE OF LAW

The Rule of Law is the notion that, in order to be effective and successful, society needs an accessible, independent and transparent legal system where all persons and organisations including the government are subject to and accountable to the law – “stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand — rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affairs on the basis of this knowledge”.⁸¹ Where the Rule of Law is in place, fundamental rights and basic human needs such as health care, social security, shelter, employment and education are self-evident

⁸¹ Hayek F *The Road to Serfdom* (Routledge Press London 1944) 54.

and hence are often taken for granted. Where the Rule of Law is lacking in a society, the abovementioned fundamentals are often also lacking.⁸²

The basic principle of the Rule of Law (although not yet known as “the Rule of Law”) was recognized and discussed by many ancient philosophers. Plato summarized his views as follows:

“Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state”.⁸³

Similarly Aristotle wrote:

“... for order is law; and it is more proper that law should govern than any one of the citizens: upon the same principle, if it is advantageous to place the supreme power in some particular persons, they should be appointed to be only guardians, and the servants of the laws”.⁸⁴

Aristotle raised several themes that still appear in modern debates regarding the Rule of Law: self-rule in conditions of political equality; government officials being subject to the law; and the identification of law with reason, serving as a defense against the potential for the abuse of power.⁸⁵

Many philosophers and legal scholars have discussed and built upon these principles. Most notably, Professor Albert Dicey, who popularised the concept of the Rule of Law and defined it as follows:

“[It] means in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of

⁸² Vieira OV “Inequality and the subversion of the Rule of Law” 2007 *Sur Rev int direitos human* 28-51.

⁸³ Plato *The Laws* (Penguin London 1970) 174.

⁸⁴ Aristotle *Politics* (Batoche Books Kitchener 1999) Book 3 78.

⁸⁵ Tamanaha BZ *On the Rule of Law: History, Politics and Theory* (Cambridge University Press New York 2004) 9.

the government ... It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts..."⁸⁶

Within the South African context, the end of apartheid was not only the end of many deeply discriminatory and racial injustices, but also the founding of the implementation of the Rule of Law within the new democratic order. In fact, in its first section, the Constitution declares that among the founding values of the nation is "supremacy of the constitution and the rule of law".⁸⁷ It therefore follows that the Rule of Law should be entrenched and upheld within South Africa.

Despite this however, the battle to establish the Rule of Law did not end in its entirety with apartheid. The South African democracy is now more than twenty years old and it is debatable whether the Rule of Law is being implemented and adhered to as strictly as it should be. This is evident by the fact that political and economic elites are too often allowed to get away with blatant corruption and unethical (and often illegal) practices.⁸⁸ The recent allegations of "state capture" is an example of this.⁸⁹ It needs to be recognised that a state's legitimacy is driven by the perceptions of its citizens - as long as a different law is seen to apply to elites, corruption will never be eradicated.⁹⁰

It has been argued that South Africa has become a "dominant party democracy".⁹¹ The result of a dominant party democracy is often the incremental erosion of all checks on the dominant party's power - the law itself potentially among them.⁹² The result has been that South Africa's judicial system finds itself progressively called upon to preserve and uphold the Rule of Law without the support of the government as a whole.⁹³ In light of the above, it is suggested that a sustainable social and

⁸⁶ Dicey AV *Introduction to the Study of the Law of the Constitution* (Macmillan London 1915) 12.

⁸⁷ Section 1 (c) the Constitution.

⁸⁸ Habib A "The state of the nation and its public service in contemporary South Africa: a critical Reflection" 2010 *Administration Publica* 19.

⁸⁹ Bhorat H *et al* "Betrayal of The Promise: How South Africa Is Being Stolen" 2017 *Public Affairs Research Institute* 2.

⁹⁰ Habib 2010 *Administration Publica* 19.

⁹¹ De Vos P "Between Promise and Practice: Constitutionalism in South Africa More Than 20 Years After the Advent of Democracy" in Adams M, Meuwese A and Ballin E H (eds) *Constitutionalism and the Rule of Law* (Cambridge University Press 2015) 7-11. Dominant party democracy is defined on page 97.

⁹² Choudhry S "He Had a Mandate': The South African Constitutional Court and the African National Congress in a Dominant Party Democracy" 2009 *CCR* 32-33.

⁹³ Ellmann S "The Struggle for the Rule of Law in South Africa" 2016 *NYL Sch L Rev* 59.

economic society can only exist in conjunction with the Rule of Law. It is therefore a real possibility that a distortion of the Rule of Law in South Africa has had a direct effect on the effectiveness of the government to adequately provide social assistance to people in need.

3.2 CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

The Constitution is the supreme law of the land; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.⁹⁴ The Constitution created the space for the first non-racial, non-sexist government of South Africa to develop together with its tenets of egalitarianism, which promotes equality and non-racialism. The equality clause of the Constitution includes 17 grounds on which no discrimination may take place.⁹⁵ In this way, South Africa ensures that immaterial beliefs are not the foundation of its welfare philosophy, but rather that constitutional rules and laws are used to interpret and enforce these sentiments.

The Bill of Rights also confers the right to a range of socio-economic rights, amongst others, those in section 28(1)(c) which include the right to basic nutrition, shelter, basic health care services and the right to social services.⁹⁶

Section 27(1)(c) of the Constitution provides everyone the right to have access to social security and, in the event that they are unable to support themselves and/or their dependants, the right to suitable, necessary social assistance. Section 27(2) in turn requires the state to take realistic measures, within its available resources, to work towards attaining the realisation of these rights. Section 27 reads as follows:

“(1) Everyone has the right to have access to-

- (a) Health care services, including reproductive health care;
- (b) Sufficient food and water; and
- (c) Social security, including if they are unable to support themselves and their dependents, appropriate social assistance.

⁹⁴ Preamble of the Constitution.

⁹⁵ The Constitution, Chapter 2, Section 9.

⁹⁶ The Constitution, Chapter 2.

- (2) The state must take reasonable legislative and other measures, within its available resources to achieve the progressive realization of each of these rights”.

Section 28 furthermore states:

“(1) every child has the right –

- (b) to family care or parental care, or to appropriate alternative care when removed from the family environment”.

Section 28(1)(c) further grants every child the right to basic social services. Section 27 (2) is a very important qualifier and has been interpreted to mean that the state's duty is not to provide all of the socio-economic rights immediately to any person who requests them.⁹⁷ This issue was first dealt with by the Constitutional Court in *Soobramoney v Minister of Health*, which is discussed in more detail below.⁹⁸

The impact of the Constitution on social welfare in South Africa has been vast. The Constitution supports the creation of a welfare state with its strong social liberal undertones by placing a positive duty on the state to protect and promote basic human rights, such as the rights to reasonable access to housing, health care, food, water and social security.

The Constitution further justifies the path towards a welfare state wherein it states: “The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights”.⁹⁹ However, “reasonable access” does not mean that an individual is necessarily entitled to these provisions. Rather, these provisions should be progressively provided, taking into account the financial ability of the state, amongst others.¹⁰⁰

Furthermore, in section 10 of the Bill of Rights, it is stated that, “Everyone has inherent dignity and the right to have their dignity respected and protected”.¹⁰¹ In the case of *Government of the Republic of South Africa and Others v Grootboom and Others* it was stated that, “[t]here can be no doubt that human dignity, freedom

⁹⁷ There are similar qualifiers in sections 24(2) and 29(1) (b) and a relatively similar provision bearing on property in section 25(5).

⁹⁸ *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC) (hereinafter referred to as the *Soobramoney* case).

⁹⁹ The Constitution, Chapter 2.

¹⁰⁰ Goldstone R J. "A South African Perspective on Social and Economic Rights." 2006 *Human Rights Brief* 4-7.

¹⁰¹ The Constitution, Chapter 2, Section 10.

and equality, the foundational values of our society, are denied those who have no food, clothing or shelter”.¹⁰² Affording socio-economic rights to all people therefore enables them to enjoy the other rights, such as human dignity, which are enshrined in chapter two of the Constitution. “The realisation of these rights is also the key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential”.¹⁰³

Section 39(1)(b) of the Constitution explicitly requires international law to be taken into account when interpreting the Bill of Rights. International law is particularly significant in the interpretation of socio-economic rights, such as the right to have access to social security and assistance.¹⁰⁴

3.3 INTERNATIONAL LAW

The Constitutional Court has affirmed that, regarding the context of section 39(1)(b), the phrase ‘public international law’ refers to international law that is binding on South Africa as well as to international law that it is not bound to.¹⁰⁵ However, binding international law does have more persuasive force, since “the lawmakers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the State in terms of [such] international law”.¹⁰⁶ Furthermore, it is emphasised that both ‘hard’ and ‘soft’ international law

¹⁰² *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (hereinafter referred to as the *Grootboom* case).

¹⁰³ The *Grootboom* case [23].

¹⁰⁴ The *Grootboom* case [26] wherein the Court makes the following observation: “The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.”

¹⁰⁵ *S v Makwanyane and Others* 1995 3 SA 391 (CC) [36-37].

“International agreements and customary international law provide a framework within which... [the Bill of Rights] can be evaluated and understood, and for that purpose decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, and the European Court of Human Rights and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions.”

¹⁰⁶ *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa* 1996 (4) SA 671 (CC) [26].

must be taken into consideration by courts in their interpretation of the Bill of Rights.¹⁰⁷

As previously discussed, the Bill of Rights sets out many socio-economic rights which form the basis of social welfare in South Africa, and international law is important when interpreting these socio-economic rights. Therefore, it can be deduced that international law cannot be disregarded when analysing the social welfare system in South Africa. The international instruments discussed briefly below, are relevant to the topic of social welfare.

3.3.1 UNITED NATIONS TREATIES

3.3.1.1 *Universal Declaration of Human Rights (Universal Declaration)*¹⁰⁸

As a non-binding declaration, it is generally acknowledged that the Universal Declaration of Human Rights has reached the status of “customary international law”. The Preamble to the Universal Declaration specifically states that its purpose is to provide “a common understanding” of human rights and fundamental freedoms and to serve “as a common standard of achievement for all peoples and all nations”.¹⁰⁹ Article 22 thereof provides as follows:

“Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organisation and resources of each state, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality”.

Article 25 caters for other areas covered by the concept of social security. Specifically, it entitles everyone the right to an adequate standard of living with regard to the health and well-being of oneself and of one’s family. An adequate

¹⁰⁷ Dugard J *et al International law. A South African perspective* (JUTA Cape Town 2000) 36 and Currie I & de Waal J *The Bill of Rights Handbook* (JUTA Cape Town 2009) 159.

¹⁰⁸ United Nations General Assembly “Universal Declaration of Human Rights” 10 December 1948 (hereinafter referred to as the Declaration of Human Rights).

¹⁰⁹ Jansen van Rensburg L and Lamarche L “The right to social security and assistance” in Brand D and Heyns C (eds) *Socio-Economic Rights in South Africa* (PULP Pretoria 2005) 173.

standard of living includes sufficient food, clothing, housing and medical care as well as essential social services and security in the event of “unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control”.

The Declaration guarantees mothers and children the right to “special care and assistance”. It is irrelevant whether the child is born in or out of wedlock.¹¹⁰ With regard to workplace benefits, employees are also afforded the right to fair remuneration in order to ensure a standard of living which upholds human dignity, and which is to be supplemented, if necessary, by other means of social assistance.¹¹¹

*3.3.1.2 The International Covenant on Economic, Social and Cultural Rights (ICESCR)*¹¹²

In 1994 President Nelson Mandela signed the ICESCR and more than 20 years later, South Africa finally ratified it on 18 January 2015.

The South African Human Rights Commission commended the decision to ratify the Covenant as follows:

“The Commission believes that the ratification will enhance the ability of the government to play a meaningful role as one of the key advocates for social, economic and cultural rights in the international arena. And it will further enable the country to keep pace with those countries that have ratified the Covenant and thus accelerate and improve the respect and observance of socio-economic rights in South Africa”.¹¹³

This Covenant can be interpreted to be in favour of a welfare state. Evidence for this is found in article 9 where the right to social security is entrenched and both the public and private components of the right are recognised. States are directed to

¹¹⁰ Article 25(2) Declaration of Human Rights.

¹¹¹ Article 23(3) Declaration of Human Rights.

¹¹² United Nations General Assembly “International Covenant on Economic, Social and Cultural Rights” 16 December 1966 (hereinafter referred to as ICESCR).

¹¹³ Statement made by Mangena I (Spokesperson for SAHR Commission) on 18 January 2015 www.sahrc.org.za (Date of Use 20 December 2018).

‘recognise the right of everyone to social security, including social insurance’.¹¹⁴ In addition to this, article 11(1), requires that states assure a sufficient standard of living to everyone.¹¹⁵ In the *Grootboom* case, the Court was able to take advantage of the jurisprudence that has been developed under the International Covenant of Economic, Social and Cultural Rights.¹¹⁶

3.3.1.3 The Convention on the Rights of the Child (CRC)¹¹⁷

The Convention on the Rights of the Child has been signed and ratified by South Africa and was in fact the first international instrument to be ratified by the new democratic government.¹¹⁸ It provides a set of rules that ensure that the rights of children are protected. The CRC sets out the civil, political, economic, social and cultural rights of children.

During the apartheid era, the unique vulnerability of children began to gain the attention of nongovernmental and community-based organisations. This vulnerability was further recognised in 1987 when the *Children, Repression and the Law in Apartheid South Africa* conference was held in Zimbabwe. In his statement, the late Oliver Tambo said the following:

“We cannot be true liberators unless the liberation we will achieve guarantees all children the rights to life, health, happiness and free development, respecting the individuality, inclinations and capabilities of each child. Our liberation would be untrue to itself if it did not, among its first tasks, attend to the welfare of the millions of children whose lives have been stunted and turned into a terrible misery by the violence of the apartheid system”.¹¹⁹

¹¹⁴ Article 9 ICESCR “The States Parties to the present Covenant recognise the right of everyone to social security, including social insurance”.

¹¹⁵ Article 11(1) ICESCR “The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family”.

¹¹⁶ The *Grootboom* case [27].

¹¹⁷ United Nations General Assembly “Convention on the Rights of the Child” 20 November 1989 (hereinafter referred to as CRC).

¹¹⁸ Signed in December 1993 and ratified on 16 June 1995.

¹¹⁹ Speech by Oliver Tambo at the International Conference on “Children, repression and the law in Apartheid South Africa” Harare 24 September 1987.

Article 23 states that “every child has the right to benefit from social security, including social insurance, and that the state should take the necessary measures to achieve the full realisation of this right in accordance with national law”. According to this Convention, social assistance should be granted after carefully considering the available resources and the circumstances of the child as well as the circumstances of those who are responsible for the maintenance of the child.¹²⁰

3.3.1.4 Convention on the Elimination of All Forms of Discrimination against Women¹²¹

Signed in January 1993 and ratified on 15 December 1995 by South Africa, the Convention on the Elimination of All Forms of Discrimination against Women insists upon the suppression of employment-related discrimination in social security and the loss of seniority or benefits due to pregnancy or marriage.¹²² It also promises the right of equality to family benefits and insurance for women.¹²³ The right for rural women to benefit directly from social security benefits is also provided for.¹²⁴ South Africa is still lacking in this area - the exclusion of certain categories of employees and non-employees from social assistance legislation is an indirect form of unfair discrimination that affects people like domestic workers, casual and informal sector workers.¹²⁵

3.3.2 INTERNATIONAL LABOUR ORGANIZATION (ILO)¹²⁶

3.3.2.1 *The Social Security (Minimum Standards) Convention*¹²⁷

The Social Security (Minimum Standards) Convention is at present, non-binding to

¹²⁰ Jansen van Rensburg and Lamarche *The right to social security and assistance* 160.

¹²¹ United Nations General Assembly “Convention on the Elimination of All Forms of Discrimination against Women” 18 December 1979 (hereinafter referred to as the Convention on the Elimination of Discrimination Against Women).

¹²² Article 11 Convention on the Elimination of Discrimination against Women.

¹²³ Article 13 Convention on the Elimination of Discrimination against Women.

¹²⁴ Article 14 Convention on the Elimination of Discrimination against Women.

¹²⁵ Domestic workers are excluded from the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

¹²⁶ ILO is a specialized agency of the UN.

¹²⁷ ILO Convention No. 102 “Social Security (Minimum Standards) Convention” 1952 The General Conference of the International Labour Organisation (hereinafter referred to as the Convention No. 102).

South Africa, due to the fact that South Africa has not yet ratified this convention.

It is submitted, however, that South Africa is in a good position to ratify the said Convention. In fact, the International Labour Office has indicated that ratification would create a concrete and workable foundation for the development and extension of social welfare for South Africa and that it is confident that the crucial elements of South Africa's social welfare system, are already consistent with Convention No. 102.¹²⁸

Convention No. 102 is possibly one of the most comprehensive standards with regard to social security.¹²⁹ Not only does this Convention insist on the consistency of available cash grants, but it also provides for minimum standards in nine distinctive areas of social welfare. These are medical care, sickness, unemployment, old age, employment injury, family, maternity, invalidity, and survivors' benefits.¹³⁰

It is however uncertain whether this Convention can provide meaningful security to informal workers such as domestic workers.¹³¹ This is because of the fact that countries only need to accept at least 3 of the 9 categories described above, as well as the fact that the theoretical framework relied upon in this convention was not developed with the informal work context in mind.¹³²

In addition to this convention, the ILO has issued recommendations to all member states (which includes South Africa) regarding income security.¹³³ Compulsory social insurance schemes which reduce the risk of poverty by re-establishing, up to a reasonable level, income which is lost by reason of inability to work (including old age) or by reason of the death of a breadwinner are one of the recommendations made by the ILO.¹³⁴

¹²⁸ Convention No. 102 120.

¹²⁹ Jansen van Rensburg and Lamarche *The right to social security and assistance* 168.

¹³⁰ Part II – X Convention No. 102.

¹³¹ Olivier M, Masabo J and Kalula E "Informality, Employment And Social Protection: Some Critical Perspectives For/From Developing Countries" 2018 <https://www.researchgate.net/publication/260322190> (Date of use 27 December 2018) 6.

¹³² Olivier, Masabo and Kalula <https://www.researchgate.net/publication/260322190> (Date of use 27 December 2018) 7.

¹³³ ILO "Income Security Recommendation" 1944 (No. 67).

¹³⁴ ILO "Income Security Recommendation" 1944 (No. 67).

3.3.3 SOUTH AFRICAN DEVELOPMENT COMMUNITY (SADC)

3.3.3.1 SADC Treaty¹³⁵

South Africa is a member state of this treaty. The Treaty is a legally binding document which sets out a comprehensive framework which member states must use in order to co-ordinate and rationalise their policies and strategies in working towards sustainable development in all areas of human endeavour.¹³⁶ One of the main functions of this treaty is that all members should act in accordance with the principals of human rights, democracy and the Rule of Law, with the objective of working towards social and economic development and poverty alleviation.¹³⁷ Furthermore, social welfare is specifically mentioned as a focus area.¹³⁸

The Charter of Fundamental Social Rights in SADC acknowledges the need for social protection, in particular of workers and vulnerable groups.¹³⁹ Article 10 of the Charter states that, "SADC Member States shall create an enabling environment such that every worker in the SADC Region shall have a right to adequate social protection and shall, regardless of status and the type of employment, enjoy adequate social security benefits. Persons who have been unable to either enter or re-enter the labour market and have no means of subsistence shall be able to receive sufficient resources and social assistance". The Charter encourages the

¹³⁵ The Consolidated Treaty of the Southern African Development Community is a consolidation of the following texts: - The Treaty of the Southern African Development Community, 1992 ; The Agreement Amending the Treaty, 2001 ; The Agreement Amending Article 22 of the the Treaty, 2007 ; The Agreement Amending the Treaty, 2008 ; The Agreement Amending Article 10A of the Treaty, 2009 and The Agreement Amending Articles 10 and 14 of the Treaty, 2009 (hereinafter referred to as the SADC Treaty). <https://www.sadc.int/documents-publications/sadc-treaty/> (Date of use: 1 January 2019).

¹³⁶ Olivier M, Kalula E and Jansen Van Rensburg L "Social Protection, Poverty Alleviation And Social Security In The Sadc Region: The Need For Developing A Co-Ordinated Social Security Paradigm" <https://www.ilo.org/public/english/iira/documents/congresses/3rdAfrica/13.pdf> (Date of use 27 December 2018) 10.

¹³⁷ Article 4 SADC Treaty.

¹³⁸ Article 21 SADC Treaty.

¹³⁹ SADC https://www.sadc.int/files/6613/5292/8383/Charter_of_the_Fundamental_Social_Rights_in_SADC2003.pdf (Date of use 27 December 2018).

development of minimum standards and the establishment of a harmonised system of social security throughout the member states.¹⁴⁰

3.4 NATIONAL LEGAL FRAMEWORK RELATING TO SOCIAL ASSISTANCE

3.4.1 THE WHITE PAPER ON SOCIAL WELFARE SERVICE¹⁴¹

The White Paper on Social Welfare Service's (WPSW) purpose was to guide the conversion of the social sector from a welfare state to one that seeks to improve the quality of life through social development services. It also forms the foundation for future policies and legislation within the social services field.¹⁴² Social development is necessary in order to promote the long-term goal of equality between previously disadvantaged people and the rest of the population. This paper is guided by three important documents: The Constitution, the Reconstruction and Development Programme (RDP) and the report on Growth, Employment and Redistribution (GEAR).

In the introductory paragraphs, the crucial complications for social welfare are recognised as the deteriorating economic growth and national income as well as the amassing poverty over the previous decades. The consequential inequalities between rich and poor, urban and rural and men and women, are raised as concerns that the new social policies will have to deal with. It would therefore seem that the welfare state is being pressurised from two directions. From the one side, the number of dependent people is rising, while from the other, the welfare state as a whole lacks the financial resources to meet these needs.¹⁴³ This explains why the WPSW adopts the view of developmental social welfare as the preferential parameter for solutions.

¹⁴⁰ Olivier, Kalula and Jansen Van Rensburg <https://www.ilo.org/public/english/iira/documents/congresses/3rdAfrica/13.pdf> (Date of use 27 December 2018) 18.

¹⁴¹ Republic of South Africa Ministry for Welfare and Population Development "White Paper for Social Welfare" Notice 1108 of 1997 *Government Gazette* 386.

¹⁴² Sevenhuijsen S *et al* "South African Social Welfare Policy: An Analysis Using the Ethic of Care" 2003 *Critical Social Policy* 301.

¹⁴³ Sevenhuijsen S *et al* 2003 *Critical Social Policy* 304.

This view of developmental social welfare can be characterised as neoliberal showing the importance of (economic) self-reliance, the development of human capital and respect for human rights.¹⁴⁴ The neoliberal vocabulary is complemented, however, by the more egalitarian values of equity and basic welfare rights for all. Additionally, there is also a strong communitarian influence which places the family in the community as the main location of care.¹⁴⁵ This is reinforced by invoking the principle of Ubuntu. This important principle is discussed in more detail in Chapter five.

Whether or not South Africa is on the path to achieve the ideals as set out in this paper, is debatable. Social development in South Africa has been an active topic of debate amongst authors. Whilst describing South Africa's struggle to transition to developmental social welfare and social work, Hölscher poses the question as to "what chance there is for social development to find a 'true structural solution' when the South African government 'does not have the political will' to work with social and economic development in a coordinated manner".¹⁴⁶ Similarly, Gray submits that "[i]t (social development) has thus been very effective in reshaping welfare policy in South Africa. However, as to whether or not it has been effective in alleviating poverty and social problems, is a very different matter".¹⁴⁷ On the other hand, Lombard has a much less negative view, stating that "there is significant evidence that the sector has made a shift to the developmental approach".¹⁴⁸

3.4.2 THE SOCIAL ASSISTANCE ACT¹⁴⁹

The Social Assistance Act and relevant regulations provides for the rendering of social assistance to beneficiaries and is arguably one of the most important pieces of legislation relating to social welfare. Social grants are an integral part of any

¹⁴⁴ The definition of neoliberalism is defined on page 98.

¹⁴⁵ Communitarianism is defined on page 97.

¹⁴⁶ Hölscher D "The Emperor's new clothes: South Africa's attempted transition to developmental social welfare and social work" 2008 *Int J Soc Welf* 114-123.

¹⁴⁷ Gray M *Developmental Social Work in South Africa. Theory and Practice* (David Philip Publishers Cape Town 1998) 20-29.

¹⁴⁸ Lombard A "The implementation of the White Paper for Social Welfare: A ten-year review" 2008 *The Social Practitioner-Researcher* 1-20.

¹⁴⁹ The Social Assistance Act 13 of 2004.

welfare state and are supported by social liberalism by addressing the economic and social issue of poverty. Due to South Africa's turbulent history, many people come from disadvantaged backgrounds and are unable to financially support themselves due to lack of education, resources or adequate health care. These persons are completely dependent on social grants. Without such grants, a large portion of the populace would suffer immensely, which would be in direct conflict with both utilitarianism and social liberalism. The regulations of this Act relate to the application for and payment of social assistance and the requirements or conditions in respect of eligibility for social assistance.¹⁵⁰

The Social Assistance Act provides for seven basic social grants. The grant amounts as at 1 April 2018 are depicted in the table below:¹⁵¹

Amounts Of Grants As At 01 APRIL 2018

Grant Type	Amount payable as of 01 April 2017	Amount payable 01 April 2018	Amount payable 01 October 2018
Older Persons Grant (Old age pension)	R 1 600.00	R 1 690.00	R 1 700.00
Older Persons Grant (Old age pension): Beneficiary older than 75 years	R 1 620.00	R 1 710.00	R 1 720.00
Disability grant	R 1 600.00	R 1 690.00	R 1 700.00
War veterans' grant	R 1 620.00	R 1 710.00	R 1 720.00
Grant-in-aid	R 380.00	R 400.00	R 410.00
Child support grant	R 380.00	R 400.00	R 410.00
Foster child grant	R 890.00	R 960.00	R 960.00
Care-dependency grant	R 1 600.00	R 1 690.00	R 1 700.00

3.4.3 THE RECONSTRUCTION AND DEVELOPMENT PROGRAMME¹⁵²

The Reconstruction and Development Programme (RDP) played an important role in the rise of the welfare state, being the first comprehensive development programme post-apartheid. It proposed five ways to combine growth with social

¹⁵⁰ Regulations Published under Government Notice R898 in Government Gazette 31356 (22 August 2008).

¹⁵¹ SASSA <http://www.sassa.gov.za/index.php/newsroom/345-new-social-grant-amounts> (date of use 13 November 2018).

¹⁵² Mandela N "The Reconstruction and Development Programme. A policy framework" 1994 African National Congress (ANC) <http://www.anc.org.za/> (Date of use 8 October 2018).

development: (1) meeting basic needs; (2) upgrading human resources; (3) strengthening the economy; (4) democratizing state and society; and (5) reorganising the state and the public sector.¹⁵³ The “basic needs” strategy was stated as resting on four pillars: (1) creating opportunities for all to develop their full potential; (2) boosting production and income through job creation, production and efficiency, improving conditions of employment and opportunities for all to sustain themselves through productive activity; (3) improving living conditions through access to better social services (health care, education, etc.); and (4) establishing a social security system and other safety nets to protect the poor, disabled, elderly and other vulnerable groups.¹⁵⁴ The central objective of the RDP was “to improve the quality of life of all South Africans, and in particular the most poor and marginalised sections of our communities”.¹⁵⁵ The government proposed to use state resources to convey social services to the needy.¹⁵⁶

3.4.4 GROWTH, EMPLOYMENT AND REDISTRIBUTION REPORT

The report on Growth, Employment and Redistribution (GEAR) expanded on neoliberal tendency, which was tentatively introduced in the RDP. GEAR was accepted by the government, despite significant opposition within the ANC and its allies (the South African Communist Party and COSATU). Many felt betrayed by their comrades who were now in government due to its much stronger neoliberal nature,¹⁵⁷ and its focus on macroeconomic solidity at the expense of jobs and redistribution.¹⁵⁸ GEAR noted a distinct shift from ‘pro-growth with equity’ to ‘pro-

¹⁵³ Cameron R “The Reconstruction and Development Programme” 1996 *J Theor Politics* 284.

¹⁵⁴ African National Congress “The Reconstruction and Development Programme: A Policy Framework” https://www.sahistory.org.za/sites/default/files/the_reconstruction_and_development_programm_1994.pdf (Date of use: 31 December 2018) 11.

¹⁵⁵ African National Congress https://www.sahistory.org.za/sites/default/files/the_reconstruction_and_development_programm_1994.pdf 18.

¹⁵⁶ Chaguna C “An Outline And Brief Analysis Of Asgisa” at the South African Catholic Bishops Conference April 2006 Parliamentary Liaison Office Briefing Paper 156.

¹⁵⁷ Mathe K *A policy study of the Growth Employment and Redistribution (GEAR) with respect to social development and adult basic education and training (ABET)* (LLM thesis University of Natal 2002) 9.

¹⁵⁸ Moyo T and Mamobolo M “The National Development Plan (NDP) : a comparative analysis with the Reconstruction and Development Programme (RDP), the Growth, Employment And Redistribution (GEAR) programme and the Accelerated and Shared-Growth Initiative (ASGISA)” 2014 *J Pub Admin* 7.

growth'. The goals of GEAR were to provide basic services to the poor, to alleviate poverty, achieve economic growth, reduce national debt, stabilise inflation and give effect to the socio-economic rights in the Constitution.¹⁵⁹ Central to both the RDP and the GEAR, was the idea of meeting basic needs.¹⁶⁰ However, despite the fact that GEAR claimed to advance the objectives of the RDP, many researchers argued that it actually contradicted the RDP.¹⁶¹ This contradiction is based on the fact that GEAR's underlying ideology had diverged considerably from the RDP's, even though the same goals were being pursued, as stated in the opening paragraph of the GEAR macroeconomic strategy.¹⁶² While the RDP was based on redistribution leading to economic growth, GEAR was based on the theory that growth equals job creation, which in turn equals wealth redistribution.

The adoption of GEAR however had the effect of circumventing the processes of training and mentorship.¹⁶³ GEAR demanded a decrease in state expenditure which in turn meant less state employees. This came at a time where the state had to be demographically transformed. As Blacks were being recruited, Whites were being encouraged to exit the system. It has been argued that this caused a major loss in institutional memory as well as a sabotaged skills transfer process.¹⁶⁴ New Black recruits (many of which had little practical experience) were said to have been set up for failure as a result.

¹⁵⁹ Chaguna "An Outline And Brief Analysis Of Asgisa" 2.

¹⁶⁰ Mathe *A policy study of the Growth Employment and Redistribution (GEAR) with respect to social development and adult basic education and training* 68.

¹⁶¹ For example: Bond P *Elite Transition from Apartheid to neoliberalism in South Africa* (Pluto Press London 2000); Groener Z "The Political and Social Contexts of Adult Education and Training in South Africa" in Indabawa SA *et al* (eds) *The State of Adult and Continuing Education in Africa* (University of Namibia Republic of Namibia 2000).

¹⁶² Department of Finance "Growth, Employment And Redistribution A Macroeconomic Strategy" www.treasury.gov.za/publications/other/gear/chapters.pdf (Date of use: 8 October 2018).

¹⁶³ Streak JS "The GEAR Legacy: Did Gear fail or move SA forward in development?" 2004 *Dev SA* 12.

¹⁶⁴ Habib 2010 *Administration Publica* 2.

3.4.5 ACCELERATED AND SHARED GROWTH INITIATIVE FOR SOUTH AFRICA (ASGISA)

Aware of the fact that growth was lacklustre and that inequality was still unacceptably high, in 2005 the government proposed ASGISA.¹⁶⁵ This policy replaced GEAR and continued to build on the foundations of the RDP's goals of growing a unified, democratic, non-sexist and non-racial society, with a single integrated economy.¹⁶⁶

ASGISA was intended to assist in improving economic growth by dealing with the following issues:

- “1. Lack of skilled and committed staff in the public service;
2. Lack of human resource to implement policies;
3. Inadequate financial resources;
4. Corruption and mismanagement of funds;
5. Lack of people-driven development;
6. Lack of proper co-ordination between institutions;
7. Barriers to entry, limits to competition and limited new investment opportunities”.¹⁶⁷

ASGISA had some useful programmes but it was very narrow in scope compared to the RDP.¹⁶⁸ After the resignation of President Thabo Mbeki, ASGISA was replaced with the New Growth Path (GNP) – the main target of which is to create five million jobs by the end of 2020.

¹⁶⁵ Hausmann R "Final Recommendations of the International Panel on ASGISA" 2008 *CID at Harvard University: Working Paper* 161.

¹⁶⁶ The Presidency Republic of South Africa "Accelerated and Shared Growth Initiative for South Africa (ASGISA) A summary" <http://www.daff.gov.za/docs/GenPub/asgisa.pdf> (Date of use: 8 October 2018) 1-19.

¹⁶⁷ Chaguna "An Outline and Brief Analysis Of Asgisa" 2.

¹⁶⁸ Moyo and Mamobolo 2014 *J Pub Admin* 20.

3.4.6 NATIONAL DEVELOPMENT PLAN (NDP)

In 2013, the government introduced the NDP as South Africa's long-term socio-economic development plan. The purpose of the NDP is to provide a policy scheme for eradicating poverty and reducing inequality in South Africa by 2030.¹⁶⁹

The NDP has four primary objectives:

1. Providing all-encompassing goals for what should be achieved by 2030.
2. Building accord on the main challenges and what needs to be done to overcome any obstacles.
3. Providing a long-term strategic outline within which more comprehensive planning can take place.
4. Creating a foundation for making choices relating to the use of limited resources.¹⁷⁰

Although the NDP defines some of the main challenges facing the country, it has been suggested that the solutions offered do not adequately address the origins of those problems.¹⁷¹ While GEAR moved away from the RDP, the NDP departed even more significantly by adopting a trickle-down approach to economic development.¹⁷²

The NDP assumes a dissimilar tactic compared to the RDP in that it abandons the “redistributive framework” of the latter and instead undertakes a “capabilities approach”, i.e. development that concentrates on generating the conditions, opportunities and capabilities that enable people to lead the lives that they desire.¹⁷³

¹⁶⁹ African National Congress “A basic guide to the RDP” www.anc.org (Date of use 8 October 2018).

¹⁷⁰ National Planning Commission <https://www.nationalplanningcommission.org.za/Pages/NDP.aspx> (Date of Use: 8 October 2018) 5.

¹⁷¹ Moyo and Mamobolo 2014 *J Pub Admin* 7.

¹⁷² Adelzadeh A “From the RDP to GEAR: the gradual embracing of neo-liberalism in economic policy” 1996 *NIEP* 4.

¹⁷³ National Planning Commission <https://www.nationalplanningcommission.org.za/Pages/NDP.aspx> (Date of use: 8 October 2018).

3.4.7 THE CHILDREN'S ACT 38 OF 2005

In 2005, children constituted 39 per cent of the total population (i.e. over 18 million children) and of these children, more than 13.5 million were apart of households which survived on R2 500 or less per month.¹⁷⁴ Furthermore, in the same year, 35 per cent of South Africa's children lived in informal settlements, and 42 per cent did not have running water in their homes.¹⁷⁵

In an attempt to rectify this sordid state of affairs, the government instructed the South African Law Commission to evaluate the standing legislation at the time. This procedure, which lasted more than ten years, culminated in the Children's Act, 38 of 2005, currently in force. Some provisions of the Act, including the reduction of the age of majority from 21 to 18, came into force on 11 July 2007, whilst the remaining provisions became operational on 1 April 2010.

The Children's Act gives effect to the important social constitutional rights of children. It also makes provision for homeless/street children,¹⁷⁶ which previous legislation did not, and recognises their psychological-social needs.¹⁷⁷ This forms an important part in social development. The Act is expected to serve as a principal force for the transformation of the welfare services system relating to children and families.¹⁷⁸

The Children's Act encompasses a detailed expression of what South Africa wants for its children and provides the possibility of steering South Africans toward a country that demands the realisation of all children's rights.

¹⁷⁴ September R "A New Children's Act For South Africa: Making It Work For Children And Families" 2014 *Social Work* 3.

¹⁷⁵ Statistics SA <https://www.statssa.gov.za/publications/P0210/P0210September2005.pdf> (Date of use: 31 December 2018).

¹⁷⁶ Section 191 (2)(k) of the Children's Act 38 of 2005.

¹⁷⁷ Section 213 (3)(a) of the Children's Act 38 of 2005.

¹⁷⁸ September 2014 *Social Work* 3.

3.4.8 EMPLOYMENT EQUITY ACT¹⁷⁹

The purpose of the Employment Equity Act is to encourage equal opportunity and fair treatment in the workforce by eradicating unfair discrimination.¹⁸⁰ It also forms a framework on which to build affirmative action procedures in order to redress the disadvantages experienced by certain designated groups and thereby ensuring their equitable representation in all occupational groups and levels.¹⁸¹

Affirmative action, among other roles, has a redistributive influence and therefore plays an important role in South Africa as a welfare state by enhancing social welfare.¹⁸² Affirmative action is discussed in more detail in Chapter four.

3.4.9 THE BROAD BASED BLACK ECONOMIC EMPOWERMENT ACT (BBBEE ACT)¹⁸³

The BBBEE Act is another Act that incorporates affirmative action. The main purpose of this legislation is to address the inequities that have resulted from the previous systematic exclusion of Black people from significant involvement in the economy. It forms an essential part of South Africa's economic transformation strategy and attempts to overcome the economic legacy of apartheid whilst broadening participation in the economy.¹⁸⁴

The three fundamental elements of the act are:

1. Direct empowerment through ownership and control of enterprises and assets;
2. Human resource development and employment equity; and

¹⁷⁹ Employment Equity Act no 55 of 1998.

¹⁸⁰ Preamble of Employment Equity Act no 55 of 1998.

¹⁸¹ Section 2 (a) and (b) Employment Equity Act no 55 of 1998.

¹⁸² Blumkina T, Margaliothb Y and Sadkac E "Incorporating affirmative action into the welfare state" 2009 *J Public Econ* 26.

¹⁸³ The Broad Based Black Economic Empowerment (B- BBEE) Act 53 of 2003 as amended by B-BBEE Act 46 of 2013 and Government's Amended Black Economic Empowerment Codes of Good Practice.

¹⁸⁴ Krüger LP "The impact of black economic empowerment (BEE) on South African businesses: Focusing on ten dimensions of business performance" 2011 *Southern African Business Review* 207.

3. Indirect empowerment through preferential procurement policies aimed at ensuring Black people benefit from government tenders.

3.5 CASE LAW

Case law forms an important part of South African law and as a primary source of law, the source of legal rules and precedents. The Constitutional Court, as the highest court in constitutional matters, is a court of first instance and a court of appeal in all constitutional matters and other matters as described in section 167 of the Constitution.¹⁸⁵ “Constitutional matters” are defined therein as “any issue involving the interpretation, protection or enforcement of the Constitution”. For this reason, the Court has been approached regarding issues relating to the rights to reasonable access to adequate housing and the right of access to healthcare services. One recurring theme that runs throughout the judgments discussed below, is that the Bill of Rights should be not be interpreted to mean that an individual is entitled to these provisions and can demand them from the government at any time. Instead, these rights are interpreted to be provided progressively by the South African government, so as not to overburden the government financially, as will be discussed in more detail below.

3.5.1 RIGHT TO ADEQUATE HOUSING

“Everyone has the right to have access to adequate housing”.¹⁸⁶

3.5.1.1 *Government of the Republic of South Africa and Others v Grootboom and Others*¹⁸⁷

The landmark case of *Grootboom* is an example of the dehumanising conditions under which many people in South Africa are still living.¹⁸⁸ The case expounds the harsh reality that many of the Constitution’s promises remain out of reach for a large

¹⁸⁵ The Constitution, Chapter 8, Section 167 as amended by Government Gazette Vol. 572 No. 36128 1 February 2013.

¹⁸⁶ The Constitution, Chapter 2, Section 26 (1).

¹⁸⁷ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (hereinafter referred to as the *Grootboom* case).

¹⁸⁸ *Grootboom* case [2].

portion of the populace. Many of the Respondents had applied for subsidised low-cost housing from the municipality but had been on the waiting list for as long as seven years. Mrs. Grootboom and the other respondents previously unsuccessfully applied for an order directing the government to provide:

- “(i) adequate basic temporary shelter or housing to the respondents and their children pending their obtaining permanent accommodation;
- (ii) or basic nutrition, shelter, healthcare and social services to the respondents who are children”.

The government argued that its housing scheme has taken the provisions of the Constitution seriously regarding social and economic rights.¹⁸⁹ Evidence for this was that the government had already provided housing for over three million families. In a unanimous decision, the Constitutional Court commended the government housing policy and its substantial achievements.¹⁹⁰ The Court did however note that the housing policy did not sufficiently provide for the poorest of the poor or for emergency situations.¹⁹¹ The Court therefore ordered the government to develop and implement a comprehensive and coordinated program to progressively realise the right of access to adequate housing.¹⁹²

Furthermore, the court decided that the right to adequate housing did not mean that the state has the responsibility to provide housing for everyone, but “requir[ed] special deliberative attention [of the State] to those whose minimal needs are not being met”.¹⁹³

¹⁸⁹ *Grootboom* case [14].

¹⁹⁰ *Grootboom* case [53].

¹⁹¹ *Grootboom* case [47-69].

¹⁹² *Grootboom* case [99].

Goldstone 2006 *Human Rights Brief* 4-7.

¹⁹³ Sunstein CR “Social and Economic Rights? Lessons from South Africa” 2001 *University of Chicago Olin Working Paper No. 124*.

3.5.1.2 *Minister of Public Works v Kyalami Ridge*¹⁹⁴

The case of *Minister of Public Works v Kyalami Ridge* involved a group of people who were living in an informal settlement that was located on the banks of a stream.¹⁹⁵ When the stream flooded unexpectedly, the people of the township lost their homes.

In accordance with the *Grootboom* decision, the government allocated 300 million rand for those affected by the flood. Temporary prefabricated homes were erected near Kyalami Ridge, an upper-middle class White residential suburb. The home owners of Kyalami Ridge argued that the situation would cause the value of their properties to decrease and have adverse environmental consequences.¹⁹⁶ They said the legislature did not have a right to take this action and that the Constitution should not be converted into legislation. A High Court judge ordered that the government immediately stop building these prefabricated houses.¹⁹⁷ The Constitutional Court, however, heard an urgent appeal and reversed the decision. The Court held that the government had acted properly in providing housing to the squatter-dwellers. It concluded that where there is a constitutional demand, no special legislation is necessary because the demand itself is sufficient legislative authority to authorise government action.¹⁹⁸

Although this decision has been criticised from an environmental perspective, it is generally agreed that the Constitutional Court should be commended because it recognised and unquestionably reaffirmed the constitutional duty of the government to provide relief for the homeless and victims of natural disasters.¹⁹⁹

¹⁹⁴ *Minister of Public Works v. Kyalami Ridge* (3) SA 1151 (CC) 2001 (hereinafter referred to as the *Kyalami Ridge* case).

¹⁹⁵ *Kyalami Ridge* case [2].

¹⁹⁶ *Kyalami Ridge* case [10 – 11].

¹⁹⁷ *Kyalami Ridge* case [8].

¹⁹⁸ *Kyalami Ridge* case [117] and [119].

¹⁹⁹ Kroeze IJ “The Constitutional Court’s contribution to sustainable development in South Africa” 2003 *PER* 88 – 94.

3.5.2 RIGHT OF ACCESS TO HEALTH CARE SERVICES

27 “(1) Everyone has the right to have access to

(a) health care services, including reproductive health care”.²⁰⁰

This right may not be directly infringed by regressive measures and, similarly to the right to access to adequate housing described above, reasonable legislative and implementation measures to achieve progressive realisation of the right are required.²⁰¹

The equivalent right in the ICESCR²⁰² is of a wider scope than the right in section 27 of the Constitution, however General Comment 14 is of assistance in interpreting the section 27 right.²⁰³ It provides a list of six main obligations States must realize:

- a) Non-discriminatory access to health facilities, goods and services;
- b) Access to the minimum, nutritionally adequate and safe food;
- c) Access to basic shelter, housing and sanitation, and safe and potable water;
- d) Provision of essential drugs;
- e) Equitable distribution of all health facilities, goods and services;
- f) Adoption and implementation of a national public health strategy and plan of action.²⁰⁴

²⁰⁰ The Constitution, Chapter 2, Section 27 (1).

²⁰¹ Currie and de Waal *The Bill of Rights Handbook* 591.

²⁰² Article 12 ICESCR.

²⁰³ General Comment No. 14 “The Right to the Highest Attainable Standard of Health” UN Doc E/C12/2000/4 (2000) (hereinafter referred to as General Comment 14).

²⁰⁴ General Comment 14 [43] and [44].

3.5.2.1 *Minister of Health v Treatment Action Campaign*²⁰⁵

In the case of *Minister of Health v Treatment Action Campaign*, the duty of the government to supply a drug called Nevirapine to pregnant mothers with HIV was in contention.²⁰⁶

In particular, the court had to deal with the individual's access to health care services under section 27 of the Constitution and the rights of children under section 28, whose parents could not afford to provide such access. The court placed the issues within the international context by referring the country's obligations in terms of the ICESR.²⁰⁷ In its decision, the Court relied on not only the right to medical treatment, but also on the right to equality, and ruled that the drug should be made available to all mothers. Furthermore, the negative duty of the state to refrain from preventing or impairing the socio-economic rights was acknowledged.

When viewed within the context of South Africa's past where, historically, facilities and privileges were limited by racial demarcations, this decision has a strong impact towards the advancement of the rights of previously disadvantaged people whose dire financial situation is, at least in part, a result of the apartheid era.²⁰⁸

3.5.2.2 *Soobramoney v Minister of Health (KwaZulu-Natal)*²⁰⁹

In *Soobramoney v Minister of Health*, Mr. Soobramoney suffered from various medical conditions which required him to receive treatment at least once per week. His life expectancy was submitted to be approximately only 18 months. He was denied treatment at a public government hospital for dialysis because the hospital only had provisions for 78 patients per week. Furthermore, priority was given to patients

²⁰⁵ *Minister of Health and Others v Treatment Action Campaign and Others* 2002 ZACC.

²⁰⁶ *Minister of Health and Others v Treatment Action Campaign and Others* 2002 ZACC [16].

²⁰⁷ ICESCR 360.

²⁰⁸ Magaisa A "Minister of Health and Others v. Treatment Action Campaign and Others (2002)" 2003 *Journal of African Law* 117-125.
Soobramoney v Minister of Health (Kwazulu-Natal) 1998 (1) SA 765 (CC) (hereinafter referred to as the *Soobramoney* case).

who were on the waiting list to receive transplants, who needed only short-term treatment and who were expected to make a full recovery.

Mr. Soobramoney brought an urgent application to the High Court, which application was dismissed.²¹⁰ The appellant however appealed this decision and the Constitutional Court heard the appeal. The Constitutional Court found that Mr. Soobramoney's case did not fit the requirements as an "emergency treatment" (which is an absolute right).²¹¹ Secondly, the Court unanimously held that it could not order the hospital to purchase more dialysis machines as it would alter the government's budget and then less money would be available for other provisions.²¹² This has since been interpreted that the court can only interfere with the government's budget in situations where there is an unconstitutional violation of equality.²¹³ The Court therefor dismissed the appeal.

3.6 CONCLUDING REMARKS

Whilst it is clear that South Africa already has a comprehensive set of social welfare laws and policies, cognisance should be had that the social and economic needs of South Africa are ever evolving and therefore it is important that these laws and policies are constantly re-evaluated in order to ensure that they are kept up to date with the needs of the country. The process of social and economic change creates new prospects and as well as new risks for every generation and laws and policies should be updated regularly to reflect this. It is also important for the government to uphold the Rule of Law in order to avoid becoming a dominant party democracy. In the next chapter, the concept of affirmative action will be discussed as well as the positive and negative impact it has had on South Africa.

²¹⁰ *Soobramoney* case [5].

²¹¹ *Soobramoney* case [21].

²¹² *Soobramoney* case [28 – 29].

²¹³ Goldstone 2006 *Human Rights Brief* 4-7.

CHAPTER FOUR:

AFFIRMATIVE ACTION IN THE CONTEXT OF SOCIAL WELFARE IN SOUTH AFRICA

The primary objective of the welfare system is to ensure that benefits and welfare are aimed towards specific needy population groups. Due to political, economic and social pressure, the South African government developed strategies and bills which encourage the major role players in the labour market to actively assist social development in the form of affirmative action.²¹⁴ Hence, in South Africa especially, affirmative action forms a crucial part of the welfare state. Both the EEA and the B-BBEE Acts provide for affirmative action measures.²¹⁵

In this chapter, the purpose of affirmative action in a social welfare context is discussed as well as the philosophical criticisms and justifications that can be raised.

4.1 DEFINITION AND PURPOSE OF AFFIRMATIVE ACTION

Affirmative action can generally be defined as a “range of governmental and private initiatives that offer preferential treatment to members of designated racial or ethnic groups, usually as a means of compensating them for the effects of past and present discrimination”.²¹⁶ According to the EEA, “affirmative action measures are measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer”.²¹⁷

In an effort to address the historic injustices of the past, the South African government introduced affirmative action measures within the labour market in order to promote equity within South Africa.²¹⁸ The basis behind this is that affirmative action provides a platform from which it is possible to attempt to change the demographic weighting of disadvantaged persons within the workplace. This is done

²¹⁴ Mukwarami, Nyirenda and Fakoya 2017 *AJPA* 1-18.

²¹⁵ These acts were more fully described in Chapter 3.

²¹⁶ Swain CM *Race versus class: The new affirmative action debate* (University Press of America 1996) 1.

²¹⁷ Section 15(2) Employment Equity Act No 55 of 1998.

²¹⁸ Reuban S and Bobat S “Constructing racial hierarchies of skill – Experiencing affirmative action in a South African organisation: A qualitative review” 2014 *SAJIP* 2.

by engaging in affirmative action measures that redress the disadvantages in employment that negatively affect certain designated groups, in order to ensure their equitable representation in all occupational categories and levels.²¹⁹ The discussion will now turn to the criticism levelled against affirmative action as well as the justification thereof.

4.2 CRITICISM OF AFFIRMATIVE ACTION

Although affirmative action in South Africa also addresses unfair discrimination against women, the physically disabled, and other designated groups, the main cause of controversy is its redistribution of job opportunities across racial groups. Contrary to the popular principle of non-discrimination, in which the general opinion is simply to refrain from treating people differently on the basis of characteristics such as race, affirmative action actively offers particular groups, which are thought to need special treatment, preferential access to valuable social resources based purely on a person's skin colour.²²⁰ Hence, it is often regarded as reverse discrimination.²²¹ It is submitted that any racial preference like this is morally wrong because it violates the most fundamental principles of fair treatment.²²²

There is an Aristotelian principle which states that "equals should be treated equally". In other words, if people of a certain race are treated differently, it could be construed that those people are being regarded as inferior, hence the need to treat them differently.²²³ This sort of view can contribute to the preservation of negative stigmas regarding the capabilities of the targeted groups and could be extremely detrimental to an entire racial and/or ethnic group.²²⁴

²¹⁹ Section 2 (a) and (b) Employment Equity Act No 55 of 1998.

²²⁰ Gibelman M "Affirmative Action at the Crossroads: A Social Justice Perspective" 2000 *JSSW* 40.

²²¹ Gamson WA and Modigliani A "The changing culture of affirmative action" in Burstein P (ed) *Equal Employment Opportunity* (Aldine de Gruyter New York 1994) 373-393.

²²² Cohen C and Sterba JP *Affirmative Action and Racial Preference: A Debate* (Oxford University Press New York 2003) 3.

²²³ Benn S and Peters RS *Social Principles and the Democratic State* (Routledge 2009) 112.

²²⁴ Sowell T *Affirmative action around the world: An empirical analysis* (Yale University Press New Haven 2005) 178.

Even those who agree that affirmative action is a useful remedy, might still object to it on the grounds that you cannot address one evil (inequality) with another (quotas and/or preferential treatment). These disparities in viewpoints signify a conflict in values and create serious obstacles to the successful implementation of the policy of affirmative action.²²⁵ Furthermore, the practice of "slot filling" based on skin colour alone has been shown to actually set those hired up for failure.²²⁶

Affirmative action has an additional negative aspect in that the ones who do not benefit from it, often see it as unfair. This can lead to intensified racial tensions and intergroup resentments.²²⁷ The well-known author, Sowell, eloquently states that, even "minor transfers of benefits can cause major resentments" when it comes to affirmative action.²²⁸ Importantly, other authors (for example Bentley and Habib) echo the opinions of many South Africans when they state that the country is confronted with the problem of how to make amends for the historical injustices whilst, at the same time, being able to build a single national identity and promote economic growth and development.²²⁹ Policies based on race often lead to preferential treatment and unfair advantages for some at the expense of others.²³⁰

Some social welfare researchers such as Gibelman, have the view that, "[j]ustice should entail equal opportunity for individuals, not statistical parity for groups identified by government".²³¹ Imagine the scenario where two individuals apply for admission to a university. One is a White person who is the son of a poor White man who makes a living by guarding cars parked outside of a certain restaurant each night. The other is a Black person who is the son of an affluent high-profile government employee. Why should the latter get preference?

While many agree that the inequality in South Africa is a direct function of the apartheid era, there are some who believe that once apartheid was abolished, it was up to individuals themselves to overcome whatever obstacles confronted them in

²²⁵ Gibelman 2000 JSSW 20.

²²⁶ Peebles-Wilkins W "Is it time to rethink affirmative action? Yes!" 1996 *J Soc Work Educ* 5-9.

²²⁷ Gibelman 2000 JSSW 140.

²²⁸ Sowell *Affirmative action around the world: An empirical analysis* 18.

²²⁹ Bentley K and Habib A *Racial redress and citizenship in South Africa* (HSRC Press 2008) 88.

²³⁰ Peebles-Wilkins 1996 *Journal of Social Work Education* 5-9.

²³¹ Gibelman 2000 JSSW 155.

acquiring their fair share of resources or achieving personal objectives. Throughout history there are many examples of previously disadvantaged groups rising socially and economically despite their previous discrimination and despite often being minorities, often ending up surpassing their discriminators.²³² Supporters of this laissez-faire position would argue that a policy of affirmative action infantilises the population it seeks to help, thereby exacerbating the consequences of years of discrimination.²³³ In this way, the designated groups which are the target of and are anticipated to benefit from affirmative action, are the same ones at risk of being harmed by the reinforcement of stereotypes.

A brief overview of recent poverty trends reported by Statistics SA, raises doubt of the efficiency of affirmative action in meeting the objectives set and providing the results which are sought. While the income per capita Gini coefficient (income inequality) has declined from 0.72 in 2006 to 0.68 in 2015, Black Africans still have the highest income inequality with a Gini coefficient of 0.65 in 2015 – an increase from 0,64 in 2006.²³⁴ Similar empirical evidence as to the ineffectiveness of affirmative action is noted in other countries.²³⁵

Sowell's personal views regarding affirmative action are in line with the statistics described above. One of the reasons he gives for the inefficiency of affirmative action is that although the strategies are designed to rectify current economic disadvantages, "their rationale is undermined when the benefits of these policies go disproportionately to those individuals within the designated groups who are the least disadvantaged—or perhaps are in more favourable positions than members of the country's general population".²³⁶

²³² Examples of this are the Chinese Americans as well as the Jews. The situation of Chinese Americans looked so hopeless that a popular expression of the time described someone facing impossible odds as having "not a Chinaman's chance." Both of these groups have overcome adversity well before affirmative action policies were put into place. See Sowell *Affirmative action around the world: An empirical analysis* 193-194.

²³³ Kraft S "Affirmative action: A solution is redefined as a problem" Unpublished manuscript Yeshiva University, Wurzweiler School of Social Work 1996 3.

²³⁴ Statistics SA <https://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-062015.pdf> (Date of use 6 November 2018).

²³⁵ Sowell *Affirmative action around the world: An empirical analysis* 184-190.

²³⁶ Sowell *Affirmative action around the world: An empirical analysis* 12.

Sowell goes further to state that affirmative action policies are not only ineffective but are also detrimental to society due to the fact that both preferred and non-preferred groups end up relaxing their efforts and lowering their goals—the preferred group because working to their fullest capacity is not necessary in order to get ahead and the non-preferred because working to their fullest capacity is seen to be futile.²³⁷

Of further interest is Habib's view that affirmative action, coupled with conservative macro-economic policies led to serious deficits with regard to public service.²³⁸ As already described above in Chapter three under the heading GEAR, these deficits were largely caused by the enrolment of Blacks (many of which were newly qualified and lacked practical experience) and the simultaneous exodus of experienced Whites who could have provided the necessary training and mentorship.²³⁹ This loss of institutional knowledge and skills unfortunately destined the newly recruited Blacks for failure.²⁴⁰ Habib argues that the public service sector was left with employees who had severe skill-related deficiencies, whilst many individuals were deployed for the incorrect reasons, such as securing state tenders. It is submitted that this further compromised the state's capacity and delegitimised it.²⁴¹

4.3 JUSTIFICATION OF AFFIRMATIVE ACTION

The criticisms discussed above, however, provide little consideration to the possibility that attaining diversity in the important areas of society, such as the labour market, is of such great value that it justifies preferences given to members of groups that are inadequately represented in those areas.

Cognisance should be had of the concept of "societal good". "Societal good" can be described as something that is valuable to all members of society.²⁴² Of course, the fact that something is valuable to all members of society does not imply that all members of society will value it, but only that all members should value it. It has

²³⁷ Sowell *Affirmative action around the world: An empirical analysis* 14.

²³⁸ Habib 2010 *Administration Publica* 2.

²³⁹ Streak 2004 *Dev SA* 12.

²⁴⁰ Habib 2010 *Administration Publica* 17.

²⁴¹ Habib 2010 *Administration Publica* 18.

²⁴² LeFevre J "The Value of Diversity: A Justification of Affirmative Action" 2003 *J Soc Philos* 125-133.

been submitted that diversity in professions is a societal good that should be valued by all members of society and that its value is so great that it outweighs any claim that individual merit should be the sole basis for membership in the professions (and, by implication, for acceptance into those institutions that are prerequisites for membership in the professions).²⁴³ Affirmative action plays a very important role in the quest for greater racial integration, equity, and justice.²⁴⁴ It is, however, argued that the justification for using race to achieve diversity would cease once the racial groups at issue were no longer underrepresented.²⁴⁵

Most other justifications of the importance of diversity are grounded in the important idea that society will be better for all if the potentials of all its citizens are equally developed. Therefore, the majority of justifications are built on the premise that, although the preference created by affirmative action may seem somewhat unfair on the surface, its honourable objectives outweigh, or in the very least, balance the unfairness. The concept of “fair discrimination” is thus often used in connection to describe affirmative action.²⁴⁶ This concept is further confirmed in Section 9 of the Constitution which provides that deviations from formal equality will be allowed, by means of affirmative action, as a form of “fair discrimination”. The role of affirmative action to restore diversity in society and the workplace has further resulted in its association with social justice and fair balances.²⁴⁷ The ideology is that the pill may be bitter, but we should swallow it because it is good for us. Despite this, it is still a common argument that any preference by race is profoundly divisive and encumbers the pursuit of a society in which racial segregation has been overcome and racial hostilities healed.²⁴⁸

Important rights protected by the Bill of Rights in the Constitution are the right to equality and the right to freedoms such as the right to freedom of association and freedom of trade, occupation and profession. This is further evident from Chapter one of the Constitution, which states that South Africa is founded on the values

²⁴³ LeFevre 2003 *J Soc Philos* 125-133.

²⁴⁴ Moses MS and Chang MJ “Toward a deeper understanding of the diversity rationale” 2006 *Educational Researcher* 6-11.

²⁴⁵ Sowell *Affirmative action around the world: An empirical analysis* 248.

²⁴⁶ Van Wyk MW “Conceptions of equality and social justice: a philosophical overview with reference to South Africa” 2002 *Southern African Business Review* 42-51.

²⁴⁷ Coetzee M *The Fairness of Affirmative Action: An Organisational Justice Perspective* (PhD Thesis University of Pretoria 2006) 38.

²⁴⁸ Cohen and Sterba *Affirmative Action and Racial Preference: A Debate* 4.

which include “human dignity, the achievement of equality and the advancement of human rights and freedoms”.²⁴⁹ Based on Rawl’s conception of social justice,²⁵⁰ it has been argued that equality in the distribution of social resources, such as education and work, is the means to achieve equal opportunity.²⁵¹ Equal opportunity, in turn, is the pre-condition for the exercise of freedom.²⁵²

The broad goal of these policies is to rectify the discriminatory practices of the past and to create a balance in both the work force and higher education that is contemplative of the balance between race, gender and disabilities. More specifically, the goal is to increase the numbers of under-represented previously disadvantaged people in all businesses and programs benefitting from governmental support in proportion to their numbers in the general population. Affirmative action compensates for past discrimination²⁵³ and assists previously disadvantaged people to contribute to economic efficiency.²⁵⁴

A contrasting approach towards affirmative action can be seen in the example of Rwanda. The historically disadvantaged Batwa people have been afforded no affirmative action measures which are directed specifically towards them. One of the main reasons Rwanda has given for not providing the Batwa with affirmative action privileges is that all Rwandans are to be treated equally.²⁵⁵ The argument is that ethnically-targeted affirmative action amounts to unequal treatment.²⁵⁶ Thus, Rwanda’s approach to ethnic unanimity means that the unequal are essentially treated equally. Although Rwanda has mechanisms which are designed to assist disadvantaged people, the Batwa are in no more a distinct category than, for

²⁴⁹ The Constitution, Chapter 1, Section 1(a).

²⁵⁰ Rawls conception is discussed in detail in Chapter 5.

²⁵¹ Figueira-McDonough J “Policy practice: The neglected side of social work intervention” 1993 *Social Work* 179-188.

²⁵² Gibelman " 2000 *JSSW* 155.

²⁵³ Feinberg W *On higher ground: Education and the case for affirmative action* (Teachers College Press New York 1998) 25.

²⁵⁴ Bowen WG, Bok D and Shulman J *The shape of the river: Long-term consequences of considering race in college* (Princeton University Press 1998) 121.

²⁵⁵ Hartley BR “Rwanda’s Post-Genocide Approach to Ethnicity and its Impact on the Batwa as an Indigenous People: An International Human Rights Law Perspective” *QUT Law Review* 62-64.

²⁵⁶ Hartley BR “Rwanda’s Post-Genocide Approach to Ethnicity and its Impact on the Batwa as an Indigenous People: An International Human Rights Law Perspective” *QUT Law Review* 63.

example, the poor.²⁵⁷ That is, Rwanda treats “in an equal manner persons or groups whose situations are objectively different”.²⁵⁸

Specific variables such as identity, culture, historic disadvantage, marginalisation and endemic discrimination are as such, not accounted for.²⁵⁹ Without accounting for cultural and contextual differences, the non-discriminating approach to relieving marginalization in Rwanda has often been proven to be ineffective.²⁶⁰ Similar results have been evident in other countries. For example, in Australia, disregard of cultural factors contributed to the failure of government housing initiatives which were supposed to alleviate social difficulties and reduce poverty.²⁶¹ Affirmative action tailored towards a specific group of people, taking into account cultural and contextual differences can thus be argued to be more effective than a blanket approach of equal treatment.

4.4 CONCLUDING REMARKS

Hiring employees from designated groups is not merely a provisional, superficial or structural change issue. These measures are not only instruments for enabling equitable representation of previously disadvantaged groups in society but are also methods which will directly result in a workforce which represents a diverse set of individual and group values, cultures and contributions. Diversity cannot be reversed: once it is embedded in an organisation, it affects every fibre of organisational life.²⁶²

Despite the many positive aspects of affirmative action, there is notable resistance from a segment of the population. Research indicates that fear between different

²⁵⁷ Hartley BR “Rwanda’s Post-Genocide Approach to Ethnicity and its Impact on the Batwa as an Indigenous People: An International Human Rights Law Perspective” *QUT Law Review* 64.

²⁵⁸ United Nations Committee on the Elimination of Racial Discrimination (CERD) *General Recommendation* 32 (2009) paragraph 8.

²⁵⁹ Hartley BR “Rwanda’s Post-Genocide Approach to Ethnicity and its Impact on the Batwa as an Indigenous People: An International Human Rights Law Perspective” *QUT Law Review* 64.

²⁶⁰ Hartley BR “Rwanda’s Post-Genocide Approach to Ethnicity and its Impact on the Batwa as an Indigenous People: An International Human Rights Law Perspective” *QUT Law Review* 66.

²⁶¹ Neutze M “Housing for Indigenous Australians” 2000 *Housing Studies* 485.

²⁶² De Beer JJ and Radley JH *A Case for Managing Diversity* (Enza Press Georgeville 2000) 5.

racial groups still leads to concealed resistance or scepticism regarding affirmative action.²⁶³ Prominent fears among Whites are those of revenge/retribution from non-Whites, lowering of standards, punitive taxation and nationalisation. Black South Africans share different fears, including the fear of being a “sell-out”, being sold out, White manipulation, victimisation and marginalisation.²⁶⁴ In a country where racial tensions are already high, it is debatable whether affirmative action is not doing more harm than good. It is thus clear that the public perception of affirmative action needs to be changed in order for fears to be put aside.

Despite these fears, affirmative action has strong roots in the South African social welfare system. If previously disadvantaged groups are provided the chance to be adequately represented in the labour force, this could, in theory, lessen the burden on the social welfare system.

It must however be kept in mind that affirmative action often compensates individuals today for what was done to groups in the past. The fact remains that every evil of past generations is irreversibly evil, despite anything that we can do now. Symbolic penance among the current generation simply creates new evils.²⁶⁵

²⁶³ De Beer and Radley *A Case for Managing Diversity* 28-40.

²⁶⁴ Leonard *A Affirmative Action in South Africa: Development approaches and legislative requirements* (University of Pretoria Etd Pretoria 2005) 63-92.

²⁶⁵ Sowell *Affirmative action around the world: An empirical analysis* 167.

CHAPTER 5:

CRITICISM AND JUSTIFICATION OF A WELFARE STATE

Social welfare seeks to address a wide range of issues. Prisoners' aid, juvenile delinquency and probation work are within its scope as well as certain parts of psychiatry and the care of the mentally challenged. It is also concerned with education, rehabilitation, health conditions, hygiene, social settlements and phases of immigration. The imperative themes of poverty, dependency, the sick and the aged are its special focus, however.²⁶⁶

In this chapter, the general philosophy, both positive and negative, of welfare states is explored, as well as the specific aspects that can be used to justify and/or criticise welfare states. Finally, the possible effects of globalisation on welfare states are discussed.

5.1 JUSTIFICATION OF A WELFARE STATE

5.1.1 GENERAL PHILOSOPHY

An ideal welfare state should ensure that even the people with the least resources are able to enjoy a set of basic needs, such as food, clothing and shelter. An egalitarian might view it as unfair when a millionaire owns a yacht while the ordinary citizen has, at most, a motorboat, however someone focusing more on ensuring that basic needs are met, would be more concerned about the people who lack all access to any kind of transportation.²⁶⁷

Without any type of welfare state, many people would be forced to accept the most onerous of labour conditions for minimal compensation, including child labour, excessive working hours and/or dangerous working environments. Therefore, welfare states reject the notion of a minimalist state that is unsympathetic to the fate

²⁶⁶ Ritchie AG "The State's Responsibility for Social Welfare" 1926 *Social Forces* 1.

²⁶⁷ Levinson S "The Welfare State" in Patterson D (Ed) *A Companion to Philosophy of Law and Legal Theory* (Blackwell Publishing Ltd) United Kingdom 2010) 556.

of the poorest among it.²⁶⁸ It ensures that the people who have suffered the negative consequences of capitalism are still protected.

John Rawls, a moral and political philosopher of the 20th century, promoted his social liberal beliefs of equal basic rights, equality of opportunity, and endorsing the interests of disadvantaged members of society.²⁶⁹ He was the first philosopher to set out a rational argument justifying the redistribution of wealth in order to help the needy.²⁷⁰

Rawls proposed two principles of justice. The first is the principle of equal liberty, which is a list of fundamental rights.²⁷¹ He defended these rights as essential in order for people to have the freedom to pursue their personal visions of a “good life”.²⁷² This is a typical justification of basic rights in contemporary political philosophy, by egalitarians and non-egalitarians alike.²⁷³ These beliefs closely resemble the human rights provided for in The Constitution, as well as the current basic social welfare policies in South Africa. He argued that a society is unjust if market institutions dominate whilst the government’s role is limited. His reasoning behind this is that free markets without state input allow a person’s social and financial situation in life to be mostly a consequence of one’s inherited natural capabilities and fortuitous social circumstances.²⁷⁴ He maintained that a person’s place of birth, social status, and family influences are matters of “luck” and should not unduly impact the benefits one receives in life. He believed that “the job of distributive justice is to limit the influence of luck so that goods might be distributed more fairly and to everyone's advantage”.²⁷⁵

With his second principal, he supported the belief that the ideal society is one that provides the best outcome for the worst-off person (also known as the “difference

²⁶⁸ Rawls *A Theory of Justice* 302 and Rawls *J Political Liberalism* (Columbia University Press New York 1993) 291.

²⁶⁸ Rawls *A Theory of Justice* 73.

²⁶⁹ Rawls *A Theory of Justice* 55.

²⁷⁰ Gorovitz S “John Rawls: A theory of justice” in Barr N (ed) *Economic theory and the welfare state* (Edward Elgar Cheltenham 2001) 365–380 ; Sarkar SP “The welfare state: Justice or theft?” 2006 *Advances in Psychiatric Treatment* 211– 213.

²⁷¹ Rawls *A Theory of Justice* 60–1 and Rawls *Political Liberalism* 291.

²⁷² Shapiro D *Is the Welfare State Justified?* (Cambridge University Press Cape Town 2007) 59.

²⁷³ Shapiro D “Liberalism, Basic Rights, and Free Exchange” 1995 *J Soc Philos* 26.

²⁷⁴ Rawls *A Theory of Justice* 62-64.

²⁷⁵ Rawls *A Theory of Justice* 234.

principal").²⁷⁶ Rawls also supported the view that people with similar talents, skills, and motivation should have the same opportunities.²⁷⁷ In this light, Rawls showed his utilitarian tendencies in that he believed that inequalities can be just, as long as they are to the benefit of the most disadvantaged.²⁷⁸ Here we see the relevance with regard to affirmative action and the EEA, discussed in Chapter four, as well as the fact that lower earning citizens pay less tax than higher earning citizens. These inequalities are arguably justified due to the fact that they benefit disadvantaged or previously disadvantaged people. Although Rawls is well known for his egalitarian views, modern philosophical egalitarians differ in their theories of justice in that they distinguish between voluntary and involuntary inequalities. They believe that only involuntary inequalities or disadvantages should be reduced or resolved.²⁷⁹ The preferred method, according to egalitarians, for fulfilling these "obligations of justice" is some form of a welfare state.²⁸⁰

Another respected philosopher who promoted the ideals of a welfare state was Jeremy Bentham, an 18th and 19th century philosopher, jurist, and social reformer, who is often considered "the founder of modern utilitarianism".²⁸¹ Bentham holds that the aim of utilitarianism is for the greatest total happiness across the population:

"An action then may be said to be conformable to the principle of utility (meaning with respect to the community at large) when the tendency it has to augment the happiness of the community is greater than any it has to diminish it".²⁸²

The most important economic goals thereof are to ensure that basic needs (such as food, water and shelter) and services are available to allow every person to have an acceptable quality of life, thereby ensuring the greatest total happiness for the greatest number of people.

Philosophical researcher, Loevinsohn, states that redistribution from the rich to the poor (for example in the form of taxes) are justified when "... the transfer of property brings about a decrease in the extent of the recipient's unsatisfied desires for items

²⁷⁶ Rawls *A Theory of Justice* 302 and Rawls *Political Liberalism* 291.

²⁷⁷ Rawls *A Theory of Justice* 73.

²⁷⁸ Rawls *A Theory of Justice* 267-273.

²⁷⁹ Shapiro *Is the Welfare State Justified?* 58.

²⁸⁰ Loevinsohn E "Liberty and the Redistribution of Property" 1977 *Philosophy and Public Affairs* 234.

²⁸¹ Lyons D *In the Interest of the Governed: A Study in Bentham's Philosophy of Utility and Law* (Oxford University Press 1991) 20.

²⁸² Bentham J *The Principles of Morals and Legislation* 3.

of property, and this decrease outweighs any increase in unsatisfied desires resulting from the transfer. So, if the redistributive alternative is chosen then overall there will be less unsatisfied desire for items of property than on the non-redistributive alternative”.²⁸³

It is therefore evident that the philosophical ideals of utilitarianism, social liberalism and egalitarianism are, in general, strongly favouring a welfare state. A more detailed discussion will now be had regarding the specific aspects of a welfare state, which justify its adoption.

5.1.2 CHILDREN

A major ethical reason for justifying a welfare state is the possible impact social assistance has on children.²⁸⁴ The term “Inclusive legal positivism” - a hybrid of legal positivism and natural law described below - can be used to justify a welfare state with regard to children in particular.²⁸⁵

Natural law highlights the intrinsic dignity, vulnerability and mitigated culpability of a child. It assumes that child rights accrue to people of a certain age merely because they are human. Legal positivism on the other hand places child rights within the confines of what is prescribed by law.²⁸⁶ The appeal of inclusive legal positivism therefore derives from the “double-barreled effects” of both natural law and positive law.

Therefore, according to inclusive legal positivism, whilst children’s rights are able to exist in the absence of law, the advancement and protection of children’s rights depend on law for both clarity regarding the description of the rights and for the enforcement thereof.

²⁸³ Loevinsohn 1977 *Philosophy and Public Affairs* 234.

²⁸⁴ Coetzee 2013 *S Afr J Econ* 427-450.

²⁸⁵ Emelonye U *Proportionality and Best Interests: Calibrating the Twin Pillars of Child Justice in Nigeria* (PhD Thesis University of Helsinki 2014) 41.

²⁸⁶ Coleman JL and Leiter B ‘Legal Positivism’ in Patterson D (ed) *A Companion to Philosophy of Law and Legal Theory* (Wiley-Blackwell 2010) 228.

The Children's Act states that every child has the rights as set out in Section 28 of the Constitution and that the state must protect, promote, protect and fulfill those rights.²⁸⁷ It also defines the "best interest of the child" standard. In addition to this, the Constitution confers upon everyone the right to housing, education, health care, food, water and more particularly, social security (including social assistance).²⁸⁸

Therefore, from an inclusive legal positivism perspective, a certain degree of social welfare is not only justified, but indeed required.

The Child Support Grant (CSG), initiated in 1997, is perhaps the most influential form of social assistance for children. Throughout the years since its inception, there has been a high level of uptake of the grant and it is widely known to be well targeted, i.e. it does in fact reach children living in poverty.²⁸⁹

In South Africa specifically, a significant positive impact is noted with regard to the granting of social assistance to child-headed households'.²⁹⁰ A comprehensive survey done in Gauteng found that the majority of children who received CSG indicated that the grants did go towards food, school expenses and clothes.²⁹¹ Without such grants, it is difficult to imagine how these children's basic needs would be met.

As Hilary Hinton "Zig" Ziglar aptly states, "our children are the only hope for the future, but we are their only hope for their present and their future". Child welfare is of particular importance because a child's contribution to the society once they enter adulthood is largely determined by their treatment during childhood.²⁹²

²⁸⁷ Children's Act 38 of 2005.

²⁸⁸ The Constitution: Bill of Rights.

²⁸⁹ Voster J and de Waal L "Beneficiaries of the Child Support Grant: Findings from a National Survey" 2008 *Southern African Journal Of Social Work And Social Development* previously The Social Work Practitioner-Researcher 233-248.

²⁹⁰ Meintjes H, Langba, J & Berry L "Demography of South Africa's children" in *South African Child Gauge 2007/2008* (UCT Children's Institute Cape Town: 2008) 64-70.

²⁹¹ Chiasolite Professional Services (for Gauteng Department of Social Development) "Child-Headed Households In Gauteng Province" 11 December 2008.

²⁹² Duncan G *et al* "How Much Does Childhood Poverty Affect the Life Chances of Children?" 1998 *American Sociological Review* 406-423.

5.1.3 WOMEN EMPOWERMENT

For centuries, women have often been treated as “second class citizens” and have often not enjoyed the same rights as men. To this day, there are still countries that actively discriminate against women, such as Saudi Arabia.²⁹³

As such, throughout the ages, many philosophical views have also been discriminatory against women. However, not all early philosophers shared these views. As early as 380BC, one philosopher is known to have supported the rights of women. This person was none other than the extraordinary philosopher Plato. His great discourse of a perfect government, “the Republic”, contains arguments for the political equality of women, which was rarely exhibited until modern times. Plato insisted that although women do differ in capacity to men, men also differ in capacity to one another. He goes further to explain that nature has dispersed all the qualities randomly amongst the two sexes and that women are, in some cases, superior to men.²⁹⁴ Therein he also quotes Socrates in saying: “Now dogs are not divided into he’s and she’s—we do not take the masculine gender out to hunt and leave the females at home to look after their puppies”.²⁹⁵

Due to the many recent feminist movements and equality rights advocates, the empowerment of women has become a core focus for many activists, humanitarians, politicians and philosophers.

Research shows that certain aspects of a welfare state often encourage and promote the empowerment of women.²⁹⁶ An example of this is the CSG. The CSG breaks the traditional mould of having a “male bread winner”. The grant is collected by the beneficiary child’s primary caregiver, whomever this may be, male or female. According to research, 96 per cent of recipients of the CSG are women.²⁹⁷

²⁹³ US Department of State, Bureau of Democracy Human Rights, and Labour "Country Reports on Human Rights Practices – 2004" <https://www.state.gov/j/drl/rls/hrrpt/2004/41731.htm>. (Date of use 26 December 2018).

²⁹⁴ Plato and Lee H *The Republic* (Penguin Harmondsworth 1974) 57.

²⁹⁵ Plato and Lee *The Republic* 57.

²⁹⁶ Patel L and Hochfeld T “It buys food but does it change gender relations? Child Support Grants in Soweto, South Africa” 2011 *Gend Dev* 2-3.

²⁹⁷ Patel and Hochfeld 2011 *Gend Dev* 9.

Therefore, it can be said that the technically “gender-neutral” CSG has in effect been “feminised”.

It has been shown that the CSG ease the burden upon women of coping with poverty, care and domestic responsibilities and obligations.²⁹⁸ The impact of the CSG on the lives of women was proven to be beneficial and it is fair to say that the grant has contributed to women’s empowerment.²⁹⁹

Access to state funded health services also plays a major role in women empowerment. Access to basic reproductive health care and contraceptives is extremely empowering to women, especially rural women who wouldn’t normally be able to afford prescription contraceptives. These women no longer need to rely on men to use condoms in order to avoid pregnancy. They are given control over their own bodies. Elderly social assistance is also particularly relevant because women are generally responsible for these types of care. The outcomes are better health status for women and their families, as well as more free time.³⁰⁰

Affirmative action measures also encourage the empowerment of women by changing society’s perception of women by increasing their impact in the workforce. Society is now more likely to view women as valuable and independent individuals who are capable of making important economic decisions and taking on leadership roles. This in turn promotes women’s self-confidence to undertake businesses and income-generating activities.³⁰¹

5.1.4 DUTY OF THE STATE

In order to maintain a peaceful and civil society, the state needs to ensure that the standard of living is acceptable to the general population (where “acceptable” is understood to mean that basic needs are met.) There are numerous generally recognised state duties. These include fulfilling basic health, sanitary, housing and

²⁹⁸ Patel and Hochfeld 2011 *Gend Dev* 9.

²⁹⁹ Patel and Hochfeld 2011 *Gend Dev* 9.

³⁰⁰ De la O Campos AP “Empowering rural women through social protection” Food and Agriculture Organization of the United Nations <http://www.fao.org/3/a-i4696e.pdf> (Date of use 13 November 2018) 13.

³⁰¹ De la O Campos AP <http://www.fao.org/3/a-i4696e.pdf> (Date of use 13 November 2018) 14.

educational needs as well as providing for services such as custodial and/or reformatory measures for prisoners, the mentally ill and the destitute.³⁰² Failure to do so could result in civil unrest as well as economic decline. It is therefore submitted that providing adequate social welfare and social protection is a significant duty of the state, if the state wishes to maintain stability within itself.

A welfare state places emphasis on ensuring that basic needs are met. Immanuel Kant suggests that social welfare is instrumentally necessary for the security and the stability of the state.³⁰³

A capitalist-based system, as well as racial segregation (as seen in the apartheid era) can generate very unequal distributions of income and standards of living. It is for this reason that, in South Africa, the promotion of equality has come to be seen as one of the chief duties of the state since the introduction of South Africa's first constitutional democracy.

A well-known argument for a welfare state is that individuals, if left to themselves, would not be able to make the right decisions because they are "myopic and uninformed".³⁰⁴ Modern economists however argue that consumers (i.e. the majority of a population in a capitalist society) are the best judges of what is good for them.³⁰⁵ Therefore, it is submitted, that a balance between a capitalist state and a welfare state should be striven for.³⁰⁶

In addition to this, the South African Constitution compels the state to ensure the "progressive realisation" of social security. Section 27 shows a clear and unambiguous undertaking by the state to develop a comprehensive social security

³⁰² Ritchie A "The State's Responsibility for Social Welfare" 1926 *Social Forces* 608-610.

³⁰³ LeBar M "Kant on Welfare" 1999 *CJPh* 225-249 and Rosen A *Kant's Theory of Justice* (Cornell University Press New York 1993) 191. Immanuel Kant is an important figure in modern philosophy whose theory of justice continues to influence contemporary discussions on justice and equality.

³⁰⁴ Sandmo A "The welfare state: a theoretical framework for justification and criticism" 1998 *Swedish Econ Pol Rev* 18.

³⁰⁵ Mankiw NG *Essential Economics* (Cengage Learning 2012) 141.

³⁰⁶ Stoesz D and Saunders D "Welfare Capitalism: A New Approach to Poverty Policy?" 1999 *Social Service Review* 380-400.

system.³⁰⁷ Various international legal instruments also either place a similar duty on the state or strongly encourage the same.³⁰⁸

5.2 CRITICISM OF A WELFARE STATE

5.2.1 GENERAL PHILOSOPHY

Free basic education, the granting of benefits to the unemployed, the disabled and the care and protection of infants and the elderly, are all vital features that make an immense contribution to the alleviation of suffering within any population.³⁰⁹ To actively criticise this noble aim may seem incredulous to some. Nevertheless, it is possible to have genuine doubts about the moral legitimacy of welfare legislation and the welfare state as a whole.

The issue of the welfare state in terms of responding to poverty has been subject to increasingly heated debates internationally, specifically with regard to economic sustainability and the question of whether it produces any long-term social improvements. These issues have been the topic for debate among researchers. Lindbeck, for example, argues that welfare states do not in fact reduce poverty and further claims that social welfare programmes undermine economic growth and thereby fail to reduce poverty in the long run.³¹⁰ According to Crook, this is due to the fact that too little of the money reaches the poor.³¹¹ Lee suggests that social grant programmes encourage reliance on benefits, which result in an increased rate of poverty.³¹²

Some more specific criticisms are discussed below.

³⁰⁷ Olivier M and Jansen van Rensburg L “Protection and enforcement of the right to social security” 2000 *Democracy & Development* 88.

³⁰⁸ E.g. ICESCR ; CRC ; Convention on the Elimination of All Forms of Discrimination Against Women ; The Social Security (Minimum Standards) Convention and the Universal Declaration, which were discussed in Chapter 3 hereof.

³⁰⁹ Simmonds NE “Welfare Rights and Freedom” 2008 *JSWFL* 1.

³¹⁰ Lindbeck *et al Turning Sweden around* 48-50.

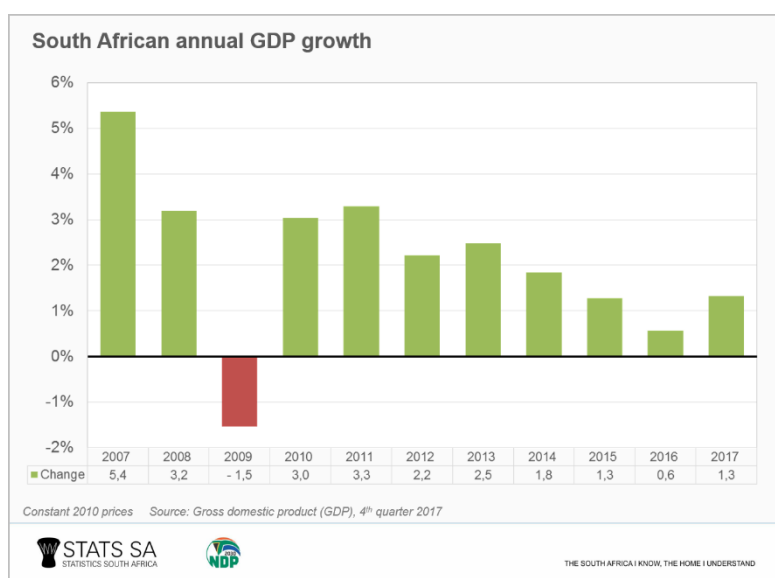
³¹¹ Crook 1997 *Economist* 1–57.

³¹² Lee 1987 *Public Choice* 149–165.

5.2.2 ECONOMIC SUSTAINABILITY

Although the social welfare policies in place are benefiting the poor in the short term, poverty figures remain high despite the ever-increasing social welfare budget.³¹³ Authors such as Tostensen contend that in order for the social security system to be viable in the current economic state, formal and informal mechanisms need to be combined.³¹⁴ In other words, the welfare state at present in South Africa is not sustainable, unless certain changes are made.

A welfare state has a “self-interest” in growing the economy, because the functioning of the economy is a critical condition for “mass loyalty” to the welfare state and, perhaps more importantly, the primary source of its revenues (gained through taxation, tariffs and loans from banks).³¹⁵ In short, the welfare state is a self-limiting state. Whilst South Africa’s gross domestic product shows only slow growth over the last 10 years (with the amount of growth decreasing each year), the annual budget for social assistance has grown exponentially each year.³¹⁶



317

³¹³ Gordhan www.treasury.gov.za (Date of use: 18 September 2017).

³¹⁴ Tostensen A “Towards feasible social security systems in sub-Saharan Africa” 2004 *CMI* working paper 19.

³¹⁵ Offe C *Contradictions of the welfare state* (MIT Press London 1984) 16.

³¹⁶ Investing <https://za.investing.com/news/economy-news/budget-2018--bigger-than-inflation-increases-for-social-grants-1034068> (Date of use: 10 October 2018).

³¹⁷ Statistics SA <http://www.statssa.gov.za/?p=10985> (Date of use: 2 January 2019).

The probability of perpetual financial deficits increases because there is an incongruity between the proliferating costs related to the welfare state and the current economic situation.³¹⁸

As such, the ever-increasing budget for grants is distressing. As Łoś stated:

“A prevailing belief is that in order to be able to support them (dependents), society cannot risk anything which would hamper the productivity incentives, and therefore, cannot lift the claimants much above subsistence level, because society could lose its economic efficiency and would not be able to provide for them anymore”.³¹⁹

5.2.3 ETHICALLY QUESTIONABLE

For most, the existence of the welfare state does not require moral justification. Free basic education and the granting of benefits to people in need is *prima facie* respectable and virtuous. It may seem absurd to ask whether this is morally justified or ethical. The situation is not as simple as it may first appear, however.

In South Africa specifically, a relatively small percentage of the population are in effect financially supporting the majority.³²⁰ From a utilitarian view, actions are right if they are useful or for the benefit of the majority. If each person has adequate means, it should theoretically create more satisfaction as a whole than if all the wealth was distributed amongst a few people only. Taxation is a logical way to achieve redistribution in order to guarantee that each person within the population has sufficient resources. From the outset, this does appear to be the ethically correct approach. However, a welfare state can be a double-edged sword.

Unlike utilitarianism, deontology does not require calculations.³²¹ Instead, it lays down absolute rules. One unconditional rule is the duty to respect other people's right to property. From this, it could be interpreted that compulsory tax is unethical, because tax is the forcible transfer of property away from the taxpayer. Similarly, many libertarians are also strongly opposed to welfare states and according to

³¹⁸ Offe *Contradictions of the welfare state* 19.

³¹⁹ Łoś M “The concept of justice and welfare rights” 1982 *JSWFL* 13.

³²⁰ SARS “The 2017 Tax Statistics” <http://www.sars.gov.za/About/SATaxSystem/Pages/Tax-Statistics.aspx> (Date of use: 7 February 2018).

³²¹ Van Staveren I “Beyond Utilitarianism and Deontology: Ethics in Economics” 2007 *Review of Political Economy* 21-35 ; Deontology is defined on page 97.

Nozick, "the state may not use its coercive apparatus for the purpose of getting some citizens to aid others".³²² He was strongly opposed to Rawls' *Theory of Justice*. His main defence of libertarianism was a moral one, i.e. an immense respect for individual rights. Nozick viewed taxation as a kind of partial slavery due to the fact that the state takes a part of the proceeds of one's labour, which he equated to the state being a partial owner of its citizens. For Rothbard, who strongly opposed utilitarianism, "the libertarian position calls for the complete abolition of governmental welfare and reliance on private charitable aid".³²³

In addition to this, deciding who qualifies for social assistance does not require any investigation into whether the person is deserving or undeserving; dependency requires only a fulfilment of certain fixed or rigid requirements.³²⁴ Is it truly ethical for undeserving people (for example people who have put themselves into a situation of hardship, like those who have chosen to spend all their resources on narcotics or alcohol) to take the hard-earned money of the diligent tax payer?

Friedrich A. Hayek, a key social theorist and political philosopher of the 20th century, is well-known for his justification of classical liberalism. He largely considered government redistribution of income (taxes) as an intolerable intrusion upon individual freedom: "the principle of distributive justice, once introduced, would not be fulfilled until the whole of society was organized in accordance with it. This would produce a kind of society which in all essential respects would be the opposite of a free society".³²⁵

The efficiency of society as a whole will also suffer loss from the redistribution of income involved in the welfare state. This is two-sided in that firstly, high taxes induces tax avoidance behaviour and secondly, high rates of grants (especially grants to compensate for income loss) tends to increase the number of people applying for social assistance.³²⁶

³²² Nozick R *Anarchy, State and Utopia* (Basic Books 1974) 9 ; Libertarianism is further defined on page 98.

³²³ Rothbard M *For a New Liberty* (New York Collier Books 1978) 148.

³²⁴ Coetzee 2013 *S Afr J Econ* 1.

³²⁵ Hayek FA *The Constitution of Liberty: The Definitive Edition* (Routledge and Kegan Paul 2013) 164.

³²⁶ Sandmo 1998 *Swedish Economic Policy Review* 14.

5.2.4 MISAPPROPRIATION OF GRANTS

Another factor to consider is that because many grants are unconditional grants (i.e. there are no restrictions or safe guards as to how the grant money is spent), there is ample opportunity for the money to be misappropriated.³²⁷ In the same Gauteng survey mentioned previously, although only one of the recipients mentioned the misuse of CSG, there was some limited evidence to suggest that some adults do in fact misuse the CSG and do not provide direct care to the children.³²⁸ Similar studies have confirmed that due to the monetary nature of the CSG, it is difficult to determine what percentage of the CSG are used for their envisioned purpose.³²⁹ In a recent study, one participant was quoted stating, “There are also those who utilise the grant for their own benefit and buy clothes for themselves instead of buying food for children”.³³⁰ One author even goes as far as to propose that most recipients who misused the grant knew the purpose of the CSG, but were often just careless and selfish in their use of it.³³¹ Although these studies are limited to the specific areas of South Africa in which they were concluded, they do provide insight into the ease of which monetary grants can be abused.

5.2.5 MINIMUM WAGE

Minimum wage laws form an important part of many welfare states, including South Africa. In instances where a minimum wage is introduced in an ideal environment, a perfect world, (i.e. a competitive labour market with full employment) very little negative impact could be imagined.

In reality, it cannot be denied that the circumstances do indeed improve for those workers who are still employed after the introduction of the minimum wage. One

³²⁷ Coetzee 2013 *S Afr J Econ* 1.

³²⁸ Chiastolite Professional Services (for Gauteng Department of Social Development) “Child-Headed Households in Gauteng Province” 11 December 2008, see specifically Section H on page 16.

³²⁹ Potts R “Social Welfare in South Africa: curing or causing poverty?” 2012 *Penn State Journal of International Affairs* 74-92.

³³⁰ Khosa P and Kaseke E “The Utilisation of The Child Support Grant by Caregivers: The Case of Ba-Phalaborwa Municipality in Limpopo Province” 2017 *Social Work* 362.

³³¹ Mutshaeni FE “The impact of Child Support Grants on the community, with special reference to Fondwe Village, Vhembe District, Limpopo Province” <http://ul.netd.ac.za> (date of use 26 December 2018).

adverse result, however, is that a percentage of workers face being retrenched due to the fact that their productivity is worth less than the minimum wage.³³² This is especially difficult for small businesses who can no longer afford to maintain their current staff. Another consequence of instituting a minimum wage is that many businesses are discouraged from hiring new workers and thus unemployment increases.³³³ Some authors have illustrated that changes in the legal minimum wage mainly affect those whose original wage is close to the minimum.³³⁴ In South Africa especially, these are frequently the poorest members of society who are often uneducated and are doing domestic or physical labour.

5.2.6 MORAL ATROPHY

According to conventional research, a welfare state depends strongly on the moral sentiments of its citizens.³³⁵ However, whilst welfare states depend upon its citizens' charitable/moral impulses, it also weakens them. The typical contention is that the very expansion of state responsibility for social welfare undermines private altruism.³³⁶ Tocqueville, a French diplomat, historian and political scientist who showed great interest in political philosophy, explains this with particular clarity:

“The more government takes the place of associations, the more will individuals lose the idea of forming associations and need government to come to their help”.³³⁷

It is similarly claimed that as each individual surrenders to the social assistance provided for by the State, sympathy towards others weakens and altruistic, mutual support becomes inert.³³⁸

Such points of view form the framework of the anarchist critique of the state in general and the welfare state in particular. Kropotkin, a Russian activist and philosopher who advocated anarcho-communism, protests that “the absorption of

³³² Sandmo 1998 *Swedish Economic Policy Review* 17.

³³³ Alaniz E, Gindling TH and Terrell K “The impact of minimum wages on wages, work and poverty in Nicaragua” 2011 *Labour Economics* 18.

³³⁴ Alaniz 2011 *Labour Economics* 19.

³³⁵ Miller D “Altruism and the welfare state” in Moon JD (ed) *Responsibility, Rights and Welfare* (Boulder Westview 1988) 163-188.

³³⁶ Goodin RE “Moral Atrophy in the Welfare State” 1993 *Policy Sciences* 64.

³³⁷ De Tocqueville A *Democracy in America* (Harper and Row New York 1996).

³³⁸ Von Humboldt W *The Limits of State Action* (Cambridge University Press 1969).

all social functions by the state necessarily favoured the development of an unbridled, narrow-minded individualism. In proportion as the obligations towards the State grew in numbers and the citizens were evidently relieved from their obligations towards each other”.³³⁹

The basic argument is that altruism and uncoerced charitable behaviour degenerate in the existence of a welfare state and propagate in its absence.³⁴⁰ In this way, a welfare state can be compared to an addictive drug. As stated by Goodin, “...the more of it we have the more we ‘need’ it and the more we come to ‘depend’ on it”.³⁴¹

These ideas have been explored systematically from a psychological point of view. The hypothesis is that when assistance could come from a large range of sources, a person's dependency reduces and, with it, a decrease in the responsibility that people feel to offer assistance occurs. In a series of laboratory experiments, social psychologists Darley and Latane tested this hypothesis. Their subjects were requested to take part in what was supposedly “a market research project”. During their participation in this project, the subjects were made to hear someone from the next room calling for help or were made to see smoke coming out from under the connecting door. The results were, that if the subject was unaccompanied in the room, there was a much higher chance that he/she would offer assistance than if he/she was in the room together with other unresponsive bystanders (the “bystander effect”).³⁴² This “diffusion of responsibility” can be explained as follows: as the number of people that could possibly assist increases, the obligation felt by any specific individual to render the required assistance is reduced.³⁴³

This would seem to support notion that a welfare state leads to moral atrophy. When a welfare state takes sole responsibility for the delivery of social welfare, the needy are made less dependent upon their fellow members of society, who are in turn relieved of the responsibility to provide voluntary aid.³⁴⁴

³³⁹ Kropotkin P *MutualAid* (Extending Horizons Boston 1913) 197.

³⁴⁰ Taylor M *Anarchy and Cooperation* (Wiley London 1976) 134; Taylor M *The Possibility of Cooperation* (Cambridge University Press Cambridge 1987) 168.

³⁴¹ Goodin 1993 *Policy Sciences* 65.

³⁴² Darley JM and Latane B “Bystander intervention in emergencies: Diffusion of responsibility” 1968 *J Pers Soc Psychol* 377-383.

³⁴³ Darley and Latane 1968 *J Pers Soc Psychol* 377-383.

³⁴⁴ Goodin 1993 *Policy Sciences* 67.

An individual's moral behaviour is a resource which should be utilised. If nurtured and grown, it can form a substitute or at least an additive for state social welfare programs. Allowing this to wither is a social waste. To prevent moral capacities from withering, the state needs to leave certain things undone.³⁴⁵

5.3 GLOBALISATION

5.3.1 POSSIBLE EFFECTS OF GLOBALISATION ON WELFARE STATES

Globalisation, and more specifically, economic globalisation can be described as the ever-growing economic interdependence of national economies worldwide.³⁴⁶ The increasing ease in which goods, services, technology, and capital can be moved across borders is one of the main causes of economic globalisation.³⁴⁷ With globalisation becoming more and more evident, the possible effects on South Africa as a welfare state are an important issue.

It has been submitted that numerous groups, including Marxists, neoliberals, political scientists, economists, and popular analysts, have “nearly identical reasoning to argue that the globalisation of capital markets has effectively increased the power of capital over governments that seek to expand or maintain relatively high levels of social protection and taxation”.³⁴⁸

Those advocating such opinions maintain that high-spending welfare states are under mounting pressure to reduce spending with regard to social welfare policies due to the fact that failure to make “domestic investment conditions attractive to internationally mobile capital”³⁴⁹ will lead to “capital flight”, which will in turn

³⁴⁵ Goodin 1993 *Policy Sciences* 75.

³⁴⁶ Velasquez G and Boulet P “Globalisation and access to drugs” <http://apps.who.int/iris/handle/10665/63905> (Date of use: 2 January 2019) 43.

³⁴⁷ Joshi RM *International Business* (Oxford University Press New York 2009).

³⁴⁸ Swank D “Political Institutions and Welfare State Restructuring: The Impact of Institutions on Social Policy Change in Developed Democracies” in Pierson P (ed) *The New Politics of the Welfare State* (Oxford University Press Oxford 2001) 203.

³⁴⁹ Evans M and Cerny P “Globalisation and Social Policy” in Ellison N and Pierson C (eds) *Developments in British Social Policy* (Basingstoke Palgrave Macmillan 2003) 19–40.

negatively affect the economy of the country.³⁵⁰ Furthermore, there is evidence to suggest that developing countries do not fully benefit from globalisation in the same way that developed countries do.³⁵¹

Some researchers however disagree with the above and believe that a welfare state and globalisation are complementary rather than contradictory.³⁵² A popular view is that due to the influx of foreign capital and technology, globalisation provides the poorer countries with a chance to develop economically which in turn increases its affluence. This creates the conditions in which social democracy and respect for human rights may prosper.³⁵³

Additionally, Globalisation indirectly pressurises both the public and the private sector to provide the necessary knowledge, skills and training to be economically, politically and socially competitive in a rapidly changing environment.³⁵⁴

It is therefore evident that research in this area has not been conclusive. Three separate conclusions have generally emerged within analyses of the impact of globalisation on welfare states:

1. Globalisation undermines welfare states
2. Welfare states can expand due to globalisation
3. Globalisation itself does not have a significant direct effect on welfare states.³⁵⁵

³⁵⁰ Hwang G "Development, Welfare Policy, and the Welfare State" from <http://internationalstudies.oxfordre.com/view/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-145> (Date of use 7 November 2018).

³⁵¹ Quattara AD "Globalisation's challenges for Africa" *IMF Survey* 177–178 ; Goldberg P and Pavcnik N "Distributional effects of globalisation in developing countries" 2007 *Journal of Economic Literature* 39–82.

³⁵² Reiger E and Leibfried S *Limits to globalisation* (Polity Press Cambridge 2003).

³⁵³ Finnegan W "After Seattle" 17-04-2000 *The New Yorker* 40-51.

³⁵⁴ Steyn GM "How do professionals develop? Lessons for the effective implementation of the South African Skills Development Act" 2004 *SA J Education* 217.

³⁵⁵ Kim T and Zurlo K "How does economic globalisation affect the welfare state? Focusing on the mediating effect of welfare regimes" 2009 *Int J Soc Welf* 130-141.

These diverse results are due to the complexity of welfare states. Each country contains different welfare strategies, policies and structures, each of which is moulded by specific historical factors.³⁵⁶

As such, the future effects of globalisation on South Africa as a welfare state cannot be accurately predicted without doing in-depth specific research, which falls outside of the scope of this thesis.

5.3.2 CAN THE WELFARE STATE BE JUSTIFIED IN AN AGE OF GLOBALISATION?

The moral principle of universality insists that we should treat all people equally. On the other hand, we have a moral instinct that we have some sort of special obligations towards our fellow citizens.³⁵⁷ This can be explained by the following example: If two people are drowning, one is your sister and the other is a stranger, your moral instinct would be to save your sister first. To put it another way, the welfare State assists the national poor to the exclusion of others. How can we justify favouring our nationals over foreigners in an age of extensive globalisation?

It is suggested that the present world is "one world" in a globalised age and that "one world" should be a moral standard that surpasses the nation-state.³⁵⁸ National borders are arbitrary in a moral sense, however welfare states discriminate on the basis of nationality.

The Constitutional Court has in fact partially addressed this issue as well as the requirements for non-citizens to qualify for social grants. In *Khosa v Minister of Social Development*,³⁵⁹ the applicants were not citizens of South Africa, but permanent residents. They challenged certain provisions of the Social Assistance Act which disqualified otherwise eligible people based on the fact that they were only permanent residents and not citizens. The court found these provisions to be

³⁵⁶ Kasza G "The illusion of welfare 'regimes.'" 2002 *J Soc Policy* 271-287.

³⁵⁷ Takikawa H "Can We Justify the Welfare State in an Age of Globalisation?: Toward Complex Border" 2006 *ARSP* 2.

³⁵⁸ Singer P *One World: The Ethics of Globalisation* (Yale University Press 2002) 152-153.

³⁵⁹ *Khosa & Others v Minister of Social Development & Others; Mahlaule & Others v Minister of Social Development & Others* 2004 6 BCLR 569 (CC) (hereinafter referred to as the *Khosa* case).

unconstitutional. It was emphasised that permanent residents are a vulnerable group which need special constitutional protection. The Court ordered that the words 'permanent resident' be 'read-in' into the challenged legislation.³⁶⁰ The result of this case is that the Court has in effect granted access to permanent residents to any social grant in South Africa for which they would otherwise be eligible for. Refugees however, because of the fact that they do not have the necessary documentation, are still not eligible for social assistance grants.³⁶¹

There are some researchers who argue for the support of welfare states in the age of globalisation. Goodin views national acts of social welfare as "special duties" which are merely "distributed general duties".³⁶² These "special duties" are just a more efficient way of accomplishing the "general duties". This approach can explain why national boundaries do indeed have significance and limitation. When national borders are operative in achieving general welfare duties, they are respected and the welfare state is justified. However, when they are not effective, sufficient resources ought to be distributed from rich countries to poor countries to discharge general responsibilities.³⁶³

This view however is criticised as a result of the fact that it puts the well-off in charge of the well-off and the badly off in charge of the badly off.³⁶⁴ This derives from the fact that all countries are not equal in their ability to provide for their citizens.³⁶⁵

5.4 CONCLUDING REMARKS

Without any type of welfare state, many people would be forced to accept the most onerous of labour conditions for minimal compensation, including child labour, excessive working hours and/or dangerous working environments. In this way, welfare states provide security to the most vulnerable people within society and as

³⁶⁰ Khosa case [92] and [95].

³⁶¹ Jansen van Rensburg and Lamarche *The right to social security and assistance* 167.

³⁶² Goodin RE "Global Justice" in: Held D and Koenig-Archibugi M (eds) *Taming Globalisation: Frontiers of Governance* (Polity Press 2003) 68-92.

³⁶³ Takikawa 2006 ARSP 19.

³⁶⁴ Takikawa 2006 ARSP 20.

³⁶⁵ Miller D *On Nationality* (Oxford University Press Clarendon1995).

such, the philosophical ideals of utilitarianism, social liberalism and egalitarianism are, in general, strongly in favour of a welfare state

South Africa, however, is not showing a strong ability to sustain the type of welfare system which is growing within the country. This, accompanied by evidence that suggests that some social grants are being misappropriated, are important points of criticism which cannot be ignored.

This chapter has demonstrated that the analysis of welfare states and the justification and criticism thereof is not a simple task. Whilst it cannot be argued that the poorest people in society often rely solely on social welfare for their survival, a balance should be reached whereby the welfare state does not jeopardize the moral fiber and economic stability of the country.³⁶⁶

³⁶⁶

Stoesz and Saunders 1999 *Social Service Review* 380-400.

CHAPTER 6:

POSSIBLE ALTERNATIVES TO A WELFARE STATE

As is apparent from the previous chapter, there are numerous reasonable grounds on which the welfare state may be critiqued. This leads to the question of whether there are any realistic alternatives. The difficult question is how to balance the advantages of a capitalist economy with due concern for those of whom capitalism leaves without essential resources. Without any sort of social protection, we would run the risk of society becoming so indifferent and unsympathetic to the fate of our fellow man that it accepts, without question, the presence of dying or starving persons in the streets for whom the state takes no responsibility. The purpose of this chapter is not go into any great detail or comparison regarding possible alternatives to a welfare state, but rather to highlight certain areas of interest which could assist in the development of an alternative to a welfare state in South Africa.

6.1 THE EXAMPLE OF RWANDA

Rwanda has the highest enrolment in health insurance in Sub-Saharan Africa.³⁶⁷ This is mainly due to the incorporation of the community-based health insurance policy (CBHI).³⁶⁸ CBHI enrolment is compulsory and coupled with out-of-pocket premiums. These are however subsidised for the poor.

Policies which are compatible with the political economy of a country but incompatible with ideas of the ruling party are likely to run into political barriers. CBHI was chosen over other potential solutions to expand access to healthcare because it was also the option the most compatible with the ruling party's core ideology.³⁶⁹

³⁶⁷ Chimouni B "The political path to universal health coverage: Power, ideas and community-based health insurance in Rwanda" 2017 *World Development* 88.

³⁶⁸ Rwanda Government
http://www.rbc.gov.rw/fileadmin/user_upload/Rwanda_Community_Based_Health_Insurance_Policy.pdf (Date of use: 6 May 2019).

³⁶⁹ Chimouni B "The political path to universal health coverage: Power, ideas and community-based health insurance in Rwanda" 2017 *World Development* 87.

In this regard, South Africa could consider incorporating a compulsory health insurance policy, which is subsidized for those who cannot afford it. However, compatibility with the ruling party's ideology would need to be ensured.

In general, social assistance in Rwanda is neoliberal in nature.³⁷⁰ Most programmes are narrowly targeted on the poorest and most food insecure, with a strong emphasis on work requirements for all beneficiaries. There are strong links to livelihood programmes aimed at making recipients more productive and thereby discouraging dependency.³⁷¹

6.2 THE EXAMPLE OF SINGAPORE

One way to avoid the problems associated with welfare states would be for free market and capitalism, in addition to the role of private charity, to work in a way which builds towards assuring that every person attains enough resources to meet their basic needs. A prime example of this in practice is that of Singapore, which has proven that economic growth and free markets go hand and hand.

Singapore requires its people to save in order to have the resources to take care of themselves in the form of a compulsory personally-accounted tax-subsidy known as the Central Provident Fund (CPF), which also includes a health insurance scheme called Medisave.³⁷² Individual responsibility for retirement, housing, education and healthcare is highlighted, which encourages self-reliance whilst discouraging entitlement. The duty on the state to provide social welfare is thus vastly reduced. In this way, Singapore has managed to avoid becoming a welfare state, whilst still ensuring that basic needs are met.

³⁷⁰ Hickey S *et al* "The negotiated politics of social protection in sub-Saharan Africa" 2018 *UNU-Wider* 15.

³⁷¹ Hickey S *et al* "The negotiated politics of social protection in sub-Saharan Africa" 2018 *UNU-Wider* 15.

³⁷² <https://www.cpf.gov.sg/Members/Schemes/schemes/healthcare/medisave> (Date of use 11 January 2019) ; Lee SA and Qian J "The Evolving Singaporean Welfare State" 2017 *Social Policy administration* 921.

Government expenditure on social protection and social redistribution is relatively small³⁷³ with social policies being subordinate to economic policies.³⁷⁴ Despite this, Singapore achieves remarkable results with regard to health and education compared to other East Asian countries.³⁷⁵ There is also only very limited assistance for the unemployed, which has been proved to encourage labour participation.³⁷⁶

The very poor, who cannot afford the compulsory contributions, are not completely forgotten however. The state provides these persons with subsidized health services which is funded by general tax revenues. Those who cannot afford the subsidized fees are given the opportunity apply for complete waivers. The conditions for a successful full waiver however are complicated and strict – employment of even one member of the family is enough reason for ineligibility.³⁷⁷

In addition to this, corporate and individual taxes are also low compared to many other countries. In 2017 the corporate tax rate in Singapore was 17 per cent and the individual tax rate ranged from 2 – 20 per cent,³⁷⁸ while in South Africa, company tax was pitched at 28 per cent, trust tax at 45 per cent and individual tax rates ranged from 18 - 41 per cent.³⁷⁹

In Singapore, public housing may be purchased by individuals using their CPF account. From a recent survey, it was found that over 80 per cent of permanent residents resided in public housing, and 90 per cent of public housing residents owned their houses in 2015.³⁸⁰

³⁷³ Lee SA and Qian J “The Evolving Singaporean Welfare State” 2017 *Social Policy administration* 917.

³⁷⁴ Holliday I “Productivist welfare capitalism: Social policy in East Asia” 2000 *Political Studies* 710.

³⁷⁵ Lee SA and Qian J “The Evolving Singaporean Welfare State” 2017 *Social Policy administration* 919.

³⁷⁶ Schmidt VH “Convergence with a twist: East Asian welfare capitalism” in Lian KF and Tong CK (eds) *Social Policy in Post-industrial Singapore* (Brill 2008) 309–332.

³⁷⁷ Ramesh K “Social Security in South Korea and Singapore” 1995 *Social Policy & Administration* 5.

³⁷⁸ <https://www.iras.gov.sg> (Date of use: 11 October 2018).

³⁷⁹ <http://www.sars.gov.za> (Date of use: 11 October 2018).

³⁸⁰ Department of Statistics and Ministry of Trade & Industry “General Household Survey 2015” <https://www.singstat.gov.sg/publications/ghs/ghs2015content> (Date of use 13 November 2018).

Singapore has made outstanding achievements in social development with a somewhat small government budget and it is definitely a social welfare model worth researching when examining alternatives to a welfare state.

Similarly to Singapore, South Korea also does not provide unemployment or family social welfare benefits to its population and has one of the lowest social spending of all developed countries.³⁸¹ South Korea also has a compulsory health insurance program known as the National Health Insurance programme. Once again, this is in stark contrast to South Africa, which has numerous state provided unemployment and family social benefits and no compulsory contributory health insurance program.

6.3 UBUNTU

“Ubuntu” is a concept centered on the values of humanness, caring, sharing, respect and compassion which ensure a functional and happy community life in the spirit of family.³⁸² Ubuntu seeks to instill human dignity, humanity, and social protection amongst human beings.³⁸³

The importance of the value of Ubuntu within the framework of social welfare should not be ignored. Ubuntu was specifically referred to in the interim Constitution,³⁸⁴ but not the 1996 Constitution. It is however submitted that Ubuntu is indirectly included in the 1996 Constitution by its frequent reference to human dignity.³⁸⁵ Ubuntu is also an ancient African worldview which forms an important part of South African traditions and customary law.³⁸⁶ It can thus be argued that Ubuntu plays a crucial role in supporting the existence of informal social welfare in South Africa. In *S v Makwanyane* it was held that Ubuntu "carries in it" the ideas of humaneness, social

³⁸¹ Fiori A and Kim S “The Dynamics of Welfare Policy-Making in South Korea: Social Movements as Policy Entrepreneurs” 2011 *Asian Social Work and Policy Review* 11.

³⁸² Broodryk J “Ubuntu African Life Coping Skills; theory and practice” delivered at the CCEM (The Commonwealth Council for Educational Administration and Management) Conference 12 - 17 October 2006 2.

³⁸³ Tshoose CI “The Emerging Role of the Constitutional Value of Ubuntu for Informal Social Security in South Africa” 2009 *Afr J Legal Stud* 4.

³⁸⁴ Constitution of Republic of South Africa (No. 200 of 1993).

³⁸⁵ Netshitomboni S *Ubuntu : fundamental constitutional value and interpretive aid* (LLM Thesis University of South Africa 1998) 11.

³⁸⁶ Himonga C, Taylor M and Pope A “Reflections On Judicial Views Of Ubuntu” 2013 *PER* 374.

justice and fairness.³⁸⁷ In *Mayelane v Ngwenyama*, the Constitutional Court emphasized the importance of “nurturing of healthy communitarian traditions like Ubuntu”.³⁸⁸

Ubuntu does not depend on the notion of state-funded assistance or benefits but rather relies on community based (private) assistance. It does not however condone inactivity or laziness and everybody within the community should contribute in some form. Generosity from others is expected to be reciprocated in the future.³⁸⁹ Ubuntu is more than just an African tradition; it is a philosophy of life, where fundamental belief is that “motho ke motho ka batho ba bangwe/umuntu ngumuntu ngabantu”, which literally translated, means “a person can only be a person through others”.³⁹⁰

Some examples of information social welfare based on the concept of Ubuntu are:

- (1) “Stokvel” – A group of people agree to make monthly payments into a stokvel or pool. Each member will then have a turn to use the combined pool, assisting them to purchase various necessary items.³⁹¹
- 2) “A burial society” – A group of people will agree to contribute money and services to a society and when an unforeseen event (for example, the death of a family member) occurs, the individual shall be permitted to claim assistance in the form of money and/or services from the society.³⁹²

Nation building using the concepts of Ubuntu can encourage to a sentiment of shared responsibility. In *S v Makwanyane*, Ubuntu is described as follows:

“The concept is of some relevance to the values we need to uphold. It is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person’s status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the

³⁸⁷ *S v Makwanyane* 1995 3 SA 391 (CC) [236].

³⁸⁸ *Mayelane v Ngwenyama* 2013 4 SA 415 (CC) [24].

³⁸⁹ Suderkasa N “African and Afro-American Family Structure: A Comparison” 1980 *Journal of Black Studies and Research* 50.

³⁹⁰ Mokgoro Y “Ubuntu” paper delivered at the first Colloquium Constitution and Law 31 October 1997 Potchefstroom 2.

³⁹¹ Dekker A H “The role of Informal Social Security in an Inter-generational Society” 2009 *International Social Security Association* 9.

³⁹² Dekker A H “The role of Informal Social Security in an Inter-generational Society” 2009 *International Social Security Association* 9.

community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all".³⁹³

The White Paper for Social Welfare also addresses the importance of Ubuntu and states that:

"The principle of caring for each other's well-being will be promoted, and a spirit of mutual support fostered. Each individual's humanity is ideally expressed through his or her relationship with others and theirs in turn through a recognition of the individual's humanity. Ubuntu means that people are people through other people. It also acknowledges both the rights and the responsibilities of every citizen in promoting individual and societal well-being".³⁹⁴

6.4 INCREASING EMPLOYMENT

One of the biggest problems South Africa faces is unemployment. Reforming the welfare system in order to promote job opportunities, employment and self-sufficiency would enable the population to be less dependent on social assistance. This could encourage a more productive mindset where work, not state social assistance, should be the primary constituent of a family's income.

This can be done by assuring that social assistance beneficiaries participate in some work-related activities as a condition for receiving welfare. An example of this would be for individuals to be assigned a public job and to work for a certain number of hours per week in order to receive their social grant.

A longer term goal would be investing in skills development to improve the chances that an individual can eventually become self-sufficient. In the United States of America, there are various successful federal, state and local programs which provide basic skills training to disadvantaged people in the view of increasing their

³⁹³ *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC) [224].

³⁹⁴ Chapter 2, paragraph 18.

likelihood of obtaining employment.³⁹⁵ South Africa could look at these successes in order to improve upon its various skills development programs.

Studies have shown that programs with activities directly related to employment, such as job-search assistance and short-term work experience, can increase employment and earnings and, in some cases, reduce welfare costs.³⁹⁶ Whilst, for example, the South African Skills Development Act does provide for job-search assistance and training programmes,³⁹⁷ most programmes are unfortunately brief workshops or courses that do not provide follow-up sessions.³⁹⁸ As a result, the outcomes of which are questionable.³⁹⁹

Additionally, the USA has various temporary grants, for example the TANF block grant which has a five-year per lifetime limit on receipt of cash assistance.⁴⁰⁰ The essence of this type of welfare is, "The state will help you, but only if you are serious about finding employment, and only for a limited time period".

6.5 CONCLUDING REMARKS

South Africa is increasing its annual social welfare expenditure continuously without much change being made to the level of poverty in the country. This system is not financially viable in the long term. Decreasing the amount of social welfare payouts and incorporating stricter conditions for payouts could perhaps improve the economic growth of the country. Compulsory contributory funds have shown

³⁹⁵ Nightingale D and Holcomb P "Alternative Strategies for Increasing Employment" 1997 *Future Child* 53.

³⁹⁶ Nightingale DS *et al* "Evaluation of the Massachusetts Employment and Training (ET) Choices program" 1990 *Urban Institute Press* ; Long SK, Nightingale DS, and Wissoker DA "The evaluation of the Washington State Family Independence Program" *Urban Institute Press* ; Riccio J, Friedlander D, and Freedman S "GAIN: Benefits, costs, and three-year impacts of a welfare-to-work program" 1994 *Manpower Demonstration Research Corporation*; Cave G *et al* "Job Start: Final report on a program for school dropouts" *Manpower Demonstration Research Corporation*.

³⁹⁷ Skills Development Act no 97 of 1998.

³⁹⁸ Steyn 2004 *SA J Education* 218.

³⁹⁹ King MB and Newman FM "Building school capacity through professional development: conceptual and empirical considerations" 2001 *The International Journal of Educational Management* 2001 86-94 ; Robinson R and Carrington S "Professional development for inclusive schooling" 2002 *International Journal of Educational Management* 239-247.

⁴⁰⁰ The Temporary Assistance for Needy Families (Date of use 9 November 2018) Available at <https://fas.org/sgp/crs/misc/RL32748.pdf>.

success in other countries and South Africa could perhaps consider implementing similar policies.

In addition to this, building a national community which uniformly upholds and values the principals of Ubuntu could create a society which is less reliant on state funded social welfare and more ready to assist fellow South Africans in times of need.

CHAPTER 7:

CONCLUSION

South Africa has become a welfare state, whilst there has been little progress towards the development envisaged by the government. This dissertation has shown that although the introduction of social welfare policies produced some promising steps towards improving the quality of life of individuals who live in poverty, there has been little improvement regarding the general socio-economic status of the majority living in South Africa.⁴⁰¹ There are still numerous challenges in terms of poverty, inequality of income distribution and social development which need to be addressed if South Africa will ever be able to move away from being a welfare state.⁴⁰² As shown in Chapter three, it is submitted that the distortion of the Rule of Law in South Africa has had a direct effect on the effectiveness of the government to adequately provide social assistance to people in need.⁴⁰³

The philosophical theories of social liberalism, utilitarianism and egalitarianism strongly support the creation of a welfare state. According to these theories, a welfare state is founded on standards that provide a solid base for civilised society. The fundamental tenets of a welfare state (co-operation, reduction of inequalities, fairness, altruism and humanitarianism) strongly appeal to humankind's inherent social nature.⁴⁰⁴ In South Africa specifically, the social welfare system clearly shows its value with regard to women and children, where the child support grant is well targeted and has a high uptake.⁴⁰⁵ As former President Nelson Mandela stated, "There can be no keener revelation of a society's soul than the way in which it treats its children".⁴⁰⁶ Without any type of welfare state, it is not hard to imagine that unethical situations, for example child labour or excessive working hours, would arise.

⁴⁰¹ Statistics SA
https://www.statssa.gov.za/presentation/Stats%20SA%20presentation%20on%20skills%20and%20unemployment_16%20September.pdf (Date of use: 1 January 2019) 29.

⁴⁰² Southall R "Introduction: Can South Africa be a developmental state?" in Buhlungu S, Daniel J, Southall R & Lutchman J (eds) *State of the Nation: South Africa* (HSRC Press Cape Town 2006) 17-41.

⁴⁰³ Paragraph 3.1.

⁴⁰⁴ Chapter 5 has shown that a welfare state is justifiable.

⁴⁰⁵ As was discussed in Chapter 5 paragraphs 5.1.2 and 5.1.3.

⁴⁰⁶ Speech by President Nelson Mandela at the launch of the Nelson Mandela Children's Fund 1995 in Pretoria.

It is, however, evident that South Africa is tipping dangerously towards an economically unstable situation.⁴⁰⁷ Although South Africa's gross domestic product growth has been decreasing annually,⁴⁰⁸ the annual budget for social assistance has grown each year.⁴⁰⁹ Due to globalisation, this economic instability could cause investors to withdraw from the country, which would negatively affect the economy even further.⁴¹⁰

However, whilst it seems apparent that the welfare state is not desirable in the long term, it is justifiable in the short term from a philosophical and ethical point of view. This is especially apparent when taking into account the positive role that social grants play with regards to children. Child welfare is paramount due to the fact that a child's ability and desire to contribute to society once they enter adulthood is essentially determined by their treatment during childhood.⁴¹¹ Furthermore, social grants such as the CSG ease the burden upon women of coping with poverty, care and domestic responsibilities and obligations and thus contribute towards women empowerment.⁴¹²

Although the critique or criticisms of a welfare state cannot be overlooked, the provision of basic human needs currently supersedes the many negative aspects (such as economic unsustainability, ethical questionability, the ease of which monetary grants can be misappropriated, possible moral atrophy and the problems that raising the minimum wage can produce).

A philosophical analysis of welfare states and the justification and criticism thereof is thus not a simple task. Whilst it cannot be argued that the poorest people in society often rely solely on social welfare for their survival, a balance should be struck and maintained whereby the welfare state does not jeopardise the economic and social stability of the country.

⁴⁰⁷ Mail & Guardian <https://mg.co.za/article/2010-02-18-sa-the-biggest-welfare-state-in-world-says-economist> (Date of use: 18 September 2017).

⁴⁰⁸ See the table under Chapter 5 on page 73.

⁴⁰⁹ Investing <https://za.investing.com/news/economy-news/budget-2018--bigger-than-inflation-increases-for-social-grants-1034068> (Date of use: 10 October 2018).

⁴¹⁰ Chapter 5, paragraph 5.3.

⁴¹¹ Duncan G *et al* "How Much Does Childhood Poverty Affect the Life Chances of Children?" 1998 *American Sociological Review* 406-423.

⁴¹² Patel and Hochfeld 2011 *Gend Dev* 9.

The interesting example of Rwanda's rejection of affirmative action shows that a blanket approach to social assistance is not always ideal. It is submitted that specifically formulated affirmative action measures (which take into consideration the culture, identity and historical disadvantage of the people to whom it is aimed) have an important place in societies with previously disadvantaged people. However, it is evident that more research needs to be done within the South African context in order to ascertain whether such measures are actually beneficial to those who are truly disadvantaged, or whether the benefits are going disproportionately to individuals who are the least disadvantaged (for example well established businessmen who have many social connections) within the designated groups.

Although most modern states would not choose to become a welfare state if they were starting afresh, it is submitted that South Africa will continue to remain a welfare state until such time as a feasible alternative becomes a realistic option. This dissertation is therefore concluding upon a conservative, in the literal sense of the term, defence of the welfare state.

As aptly described in UNICEF's 1997 Progress of Nations report:

"The day will come when nations will be judged not by their military or economic strength, nor by the splendour of their capital cities and public buildings, but by the well-being of their peoples: ...by the provision that is made for those who are vulnerable and disadvantaged; and by the protection that is afforded to children".⁴¹³

7.1 THE WAY FORWARD

Furniss and Tilton argue that "[o]ne can make the case for the social welfare state without contending that it constitutes a panacea for all social ills".⁴¹⁴

The welfare state of the future should be a hybrid welfare state. The 'pure doctrine of state welfare', as described in this dissertation, has shown to be defective. The importance of family support, voluntary community groups and the private market

⁴¹³ UNICEF "The progress of nations" <https://www.unicef.org/pon98/pon98.pdf> (Date of use 1 January 2019) 1.

⁴¹⁴ Furniss N and Tilton TA *The case for the welfare state: from social security to social equality* (Indiana University Press Bloomington 1979) 22.

needs to be recognised and incorporated into the welfare state. The development of new partnerships between statutory and voluntary, formal and informal, the family and state should be explored. Furthermore, interracial tensions with regard to affirmative action laws need to be addressed and dealt with if it is to become an effective, publically accepted law. South Africa needs to contemplate a more sustainable long-term plan. It is proposed that it could be beneficial to consider implementing portions of other social welfare models alluded to (such as the compulsory health insurance policies adopted by Rwanda and Singapore) and/or focus more on integrating traditional African philosophies, such as the notion of Ubuntu.⁴¹⁵ Increasing and improving upon programs which provide job-search assistance, work experience, training and education is also an important avenue to pursue.

Those in control of welfare state policies and their development must also take public education about welfare much more seriously. Setting out the achievements and problems, limitations and possibilities of state welfare, need to be given much more emphasis. Although strong social welfare policies can play a stabilising role,⁴¹⁶ the fact remains that the welfare state in South Africa is becoming increasingly unsustainable, with unemployment progressively rising and the number of beneficiaries on social grants growing steadily.⁴¹⁷ Given South Africa's discriminatory history and the current levels of poverty and inequality, the need for a comprehensive approach to redress this is critical.⁴¹⁸

⁴¹⁵ Chapter 6.

⁴¹⁶ Le Roux P "Why a universal income grant for South Africa should be financed through VAT and other indirect taxes" in Standing G and Samson M (eds.) *A basic income grant for* (UCT Press Cape Town 2003) 39-55 ; OECD Library https://www.oecd-ilibrary.org/economics/oecd-annual-report-2009_annrep-2009-en (Date of use: 2 January 2018).

⁴¹⁷ Statistics SA
https://www.statssa.gov.za/presentation/Stats%20SA%20presentation%20on%20skills%20and%20unemployment_16%20September.pdf (Date of use 13 November 2018).

⁴¹⁸ Dinbabo 2011 *Social Welfare Policies and Child Poverty in South Africa: A Microsimulation Model on the Child Support Grant* 32.

ABBREVIATIONS

ASASWEI -	Association of South African Social Work Education Institutions
CCR -	Constitutional Court Review
CHIR –	Child Indicator Research
CID –	Center for International Development
CMI -	Continuous Mortality Investigation
CSSR –	Center for Social Science Research
HSRC –	Human Science Research Council
IRR –	Institute of Race Relations
MIT -	Massachusetts Institute of Technology
NIEP -	National Institute for Economic Policy
SARPN -	Southern African Regional Poverty Network
SARS –	South African Revenue Services
UWC –	University of the Western Cape

DEFINITIONS

Communitarianism: A philosophy that believes in a society where individuals co-exist with a deep interdependency focusing on strong qualities of mutual help and trust. It is a culture of group loyalty, where group interests take precedence over individual interests.⁴¹⁹

Constitutional democracy: a system of government where the people exercise power by voting and where the elected government's powers are limited by a constitution.⁴²⁰

Developmental State: a state which focuses on balancing economic growth with social development.⁴²¹

Deontology: A philosophy which is centred on duty or obligation.⁴²² Rawls defines deontological as any moral theory that is not teleological. He defines as teleological any theory in which "the good is defined independently from the right, and then the right is defined as that which maximizes the good".⁴²³

Dominant party democracy: A democracy where one party enjoys electoral dominance with no sign of a credible electoral competitor in the foreseeable future.⁴²⁴

Egalitarianism: a philosophy that prioritizes equality for all people and which advocates the removal of economic inequalities among people, "the belief that all people are of equal worth and should be treated equally in society".⁴²⁵

⁴¹⁹ Hughes G "Communitarianism and law and order" 1996 *Critical Social Policy* 20.

⁴²⁰ Bellamy R "Constitutional Democracy" in Gibbons MT (ed) *The Encyclopedia of Political Thought* (Wiley-Blackwell New Jersey 2015).

⁴²¹ http://www.dsd.gov.za/index.php?option=com_content&task=view&id=29&Itemid=53 (Date of use: 7 February 2018).

⁴²² Broome D "Deontology and Economics" 1992 *Economics and Philosophy* 269.

⁴²³ Rawls *Theory of Justice* 24.

⁴²⁴ De Vos *Between Promise and Practice: Constitutionalism in South Africa More than 20 Years After the Advent of Democracy* 233-237.

⁴²⁵ Siegel JI, Licht AN and Schwartz SH "Egalitarianism and international investment" 2011 *J. Financial Econ* 3.

Laissez-faire: a policy of minimum governmental interference in the economic affairs of individuals and society.⁴²⁶

Libertarianism: a political philosophy which believes in inalienable rights, extreme economic individualism and free markets - an extreme laissez-faire philosophy.⁴²⁷

Neoliberalism: an ideology that emphasizes the value of free market capitalism and laissez-faire economics.⁴²⁸

Social Assistance: any social grant including social relief of distress.⁴²⁹

Social Development: a process of strategic change intended to promote the well-being of the population as a whole in conjunction with a dynamic process of economic development focusing on poverty reduction, empowerment, sustainable livelihoods and participation; To enable the poor, the vulnerable and the excluded within South African society to secure a better life for themselves, in partnership with them and with all those who are committed to building a caring society.⁴³⁰

Social Grant: monetary funding including a child support grant, a care dependency grant, a foster child grant, a disability grant, an older person's grant, a war veteran's grant and a grant-in-aid.⁴³¹

Social liberalism: a political philosophy which believes that a government has an important role in creating economic and social well-being for its citizens by actively addressing issues such as poverty, health care and education.

⁴²⁶ Lindsay MJ "In Search Of Laissez-Faire Constitutionalism" 2010 *Harv L Rev* 1.

⁴²⁷ Bealey F and Johnson AG *The Blackwell Dictionary of Political Science : A User's Guide to Its Terms* (Blackwell Oxford 1999) 193.

⁴²⁸ <https://www.britannica.com/topic/neoliberalism> (Date of use: 2 January 2018).

⁴²⁹ Section 1 The Social Assistance Act 13 of 2004.

⁴³⁰ http://www.dsd.gov.za/index.php?option=com_content&task=view&id=29&Itemid=53 (Date of use 7 February 2018).

⁴³¹ Section 1 of The Social Assistance Act 13 of 2004.

Social Security: refers to contributory schemes of social protection, in terms of which benefits for a variety of possible contingencies are ‘earned’ through the payment of contributions.⁴³²

Social Welfare: a condition of social well-being which arises from support from the Government, including both social assistance and social development.

Utilitarianism: a philosophy according to which the rightness or wrongness of an action should be judged by its consequences with the goal to promote the greatest happiness for the greatest number of people.⁴³³

Welfare State: a social system where the Government has a primary responsibility to safeguard the health and well-being of its citizen.

⁴³² Scheinin M “The right to social security” in Eide A and Rosas A (eds) *Economic, social and cultural rights: A Textbook* (Springer Netherlands 2001) 159.

⁴³³ Burns JH “Happiness and Utility: Jeremy Bentham’s Equation” 2005 *Utilitas* 1.

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